IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

TEXAS BANKERS ASSOCIATION; RIO BANK, MCALLEN, TEXAS; and AMERICAN BANKERS ASSOCIATION *Plaintiffs*, v. CONSUMER FINANCIAL PROTECTION BUREAU; and ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau, *Defendants*.	Case No: 7:23-cv-00144

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TBA v. CFPB – Joint Appendix Designations

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if the transaction was not originated) is in a county with a population of more than 30,000.[655] Under Regulation C, the financial institution generally finds the census tract by geocoding using the address of the property. Geocoding is the process of using a particular property address to locate its geographical coordinates, and from those coordinates one can identify the corresponding census tract.

CRA reporting of business loans by depository institutions also requires reporting of census tract. The Bureau understands that CRA allows reporting of a census tract based on the address or location where the proceeds of the credit will be principally applied.[656]

The Bureau proposed § 1002.107(a)(13) to require financial institutions to collect and report the census tract data point using a ''waterfall'' approach. The proposed rule would have required a financial institution to collect and report the census tract in which is located: (i) The address or location where the proceeds of the credit applied for or originated will be or would have been principally applied; or (ii) If the information in (i) is unknown, the address or location of the main office or headquarters of the applicant; or (iii) If the information in both (i) and (ii) is unknown, another address or location associated with the applicant. In addition, the proposed rule would have required that the financial institution also indicate which one of the three types of addresses or locations listed in (i), (ii), or (iii) the census tract is based on. Although the proposed rule did not specifically require it, the Bureau assumed that financial institutions or their vendors would generally use a geocoding tool to analyze the appropriate address to identify a census tract number.

The proposed approach would have required a financial institution to report the census tract of the proceeds address if it was available but would not have required a financial institution to ask about it specifically. Financial institutions would have been able to apply the waterfall approach to the addresses they were currently collecting; they would not have been required to specifically ask for the proceeds or headquarters addresses. In addition, the proposed method would have allowed a financial institution to report that it was unsure about the nature of the address if it had no information as to the nature or function of the business address it possessed.

Proposed comment 107(a)(13)–1 would have provided general instructions on using the waterfall reporting method, with examples for guidance. The Bureau believed that this comment would facilitate compliance and sought comment on whether any additional instructions or examples would be useful.

Proposed comment 107(a)(13)–2 would have explained that a financial institution would comply with proposed § 1002.107(a)(13) by identifying the appropriate address or location and the type of that address or location in good faith, using appropriate information from the applicant's credit file or otherwise known by the financial institution. The comment would also have made clear that a financial institution would not be required to investigate beyond its standard procedures as to the nature of the addresses or locations it collects.

Proposed comment 107(a)(13)–3 would have explained that pursuant to proposed § 1002.107(c)(1) a financial institution would be required to maintain procedures reasonably designed to collect applicant-provided information, which would include at least one address or location for an applicant for census tract reporting. However, the comment would have further explained that if a financial institution was nonetheless unable to collect or otherwise determine any address or location for an application, the financial institution would report that the census tract information was ''not provided by applicant and otherwise undetermined.''

The Bureau proposed a safe harbor in § 1002.112(c)(1) (renumbered as § 1002.112(c)(2) in the final rule), which would have stated that an incorrect entry for census tract would not be a violation of ECOA or subpart B if the financial institution obtained the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau. Proposed comment 107(a)(13)–4 would have cross-referenced that provision. See the section-by-section analysis of § 1002.112(c)(2) below for additional discussion of this safe harbor.

During the SBREFA process, some small entity representatives explained that they generally collect the main office address of the small business, which for sole proprietorships will often be a home address, and were generally not aware of the proceeds address. The Bureau's proposed waterfall approach would accommodate this situation by allowing financial institutions to report census tract using the address that they currently collect. While several small entity representatives were already geocoding applicants' addresses, others were concerned about the burden associated with geocoding for HMDA and one expressed a preference for the CRA method of geocoding, as did several other stakeholders. Accordingly, the Bureau sought comment on the difference between geocoding for HMDA and for CRA, and any specific advantages or disadvantages associated with geocoding under either method. In regard to a small entity representative's request for a Federal government tool capable of batch processing for geocoding of addresses, the Bureau noted that it was considering the utility of such a tool. As the SBREFA Panel recommended, the Bureau sought comment on the feasibility and ease of using existing Federal services to geocode addresses in order to determine census tract for section 1071 reporting purposes (such as what is offered by the FFIEC for use in reporting HMDA and CRA data).

The Bureau sought comment on its proposed approach to the census tract data point. In addition to the specific requests for input above, the Bureau noted that the waterfall method was intended to allow CRA reporters to provide the same data for both reporting regimes, but requested comment on whether the proposed method would achieve this goal and, if not, whether and how this data point should be further coordinated with CRA.

Comments Received

The Bureau received comments on this aspect of the proposal from numerous lenders, trade associations, community groups, and others. Several commenters supported the inclusion of the census tract data point, and many specifically discussed and supported the proposed waterfall approach to reporting. One CDFI lender stated that it currently collects this information for the CDFI Fund. Several community groups discussed the importance of knowing where loans were made to combat redlining and ensure that socially disadvantaged farmers and other small businesses can have appropriate access to credit. A community group and a trade association agreed with the Bureau's proposal that the waterfall method would allow section 1071 reporting to match CRA requirements. Another trade association said that financial institutions would be able to use an address provided by the applicant and agreed that reporting of the proceeds address would allow coordination with CRA, though it did not comment on the

[655] Regulation C § 1003.4(a)(9)(ii)(C). Regulation C also requires reporting of the property address for all applications.

[656] *See* 2015 FFIEC CRA Guide at 16.

proposed waterfall. Although they supported the waterfall approach, two community groups requested that financial institutions be required to ask for the location where the proceeds of the credit would be used, stating that this method would allow for better coordination with CRA and better fulfillment of the purposes of section 1071.

Several industry commenters stated that the census tract data point would be confusing and difficult to report. One commenter pointed out that multiple applicant addresses and address changes for applicants would complicate reporting. A national auto finance trade association stated that its members do not work with census tracts and that technical and process changes would be necessary to deliver this data.

A trade association stated that geocoding will be a significant burden for many credit unions, the vast majority of which do not collect census tract information for small business loans. That commenter further stated that although some CDFI credit unions collect census tract information, many are completely unfamiliar with census tracts—particularly credit unions that are not HMDA reporters. The commenter also said that the FFIEC geocoder does not permit batch inputs, which it said further slows application processes. Finally, the commenter requested that the Bureau develop a free tool that permits batch inputs and better enables efficient and cost-effective compliance.

Two banks and a trade association commented that many banks that are not HMDA reporters are unfamiliar with census tracts. Commenters also stated that the FFIEC geocoder works efficiently for addresses in and close to metro areas, but not as easily for more rural addresses, and in relation to new subdivisions and developments. They further pointed out that when an address is not "matched" in the FFIEC system, it requires manual plotting, which is time-consuming and difficult, and stated that a bank that makes strictly agricultural loans might find many non-matching addresses. Finally, two of these commenters suggested that reporting the State and county codes should be sufficient when there is no match in the FFIEC geocoder.

Several industry commenters specifically objected to the waterfall reporting method, which they stated was confusing and difficult, and many suggested it should not be mandatory. Some of these commenters requested clarification on how to report if there are multiple proceeds addresses, or if the bank learns of a different proceeds address after the loan closes. In addition, two commenters asked that the Bureau clarify whether the census tract should match the mailing address of the applicant or the physical address.

Numerous banks and trade associations stated that section 1071 reporting requirements, especially the census tract data point, overlapped or conflicted with HMDA and CRA reporting requirements, creating unnecessary difficulties. Most of these commenters asked that the Bureau coordinate these requirements and provide a complete exemption from section 1071, HMDA, or CRA for loans that overlap. Commenters requesting exemptions did not explain why the use of the proceeds address would not allow coordination between section 1071 and CRA census tract reporting.

Some industry commenters expressed concern that census tract information, especially when combined with the NAICS business type and other reported data, could facilitate reidentification of small business applicants. These commenters stated that this risk would be greater in rural areas.

Comments addressing the Bureau's proposed safe harbor for use of certain geocoders are addressed in the section-by-section analysis of § 1002.114(c)(1) below.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(13) and associated commentary with a minor edit for clarity. Final § 1002.107(a)(13) requires that financial institutions collect and report the census tract data point using the "waterfall" approach described above.

In regard to the comments expressing concern about the burden associated with collecting and reporting census tract information using a geocoder and by other means, the Bureau notes that census tract is specifically enumerated as a data point in the statute. In addition, the Bureau believes that its reporting method for the census tract data point leverages existing industry information collection practices and will result in useful information to further section 1071's purposes while avoiding imposing much additional burden on financial institutions. The waterfall method allows a financial institution to report census tract using an address it already has, with no further investigation; allows a financial institution to avoid further investigation when it is unsure about the nature of the address reported; and allows current CRA reporters to report the same address for this rule as they do for CRA.[657] In addition, the waterfall method prioritizes the proceeds address, which the Bureau considers to be particularly useful for both the fair lending and business and community development purposes of section 1071.

The waterfall approach adopted in the final rule requires a financial institution to report the census tract of the proceeds address if it is available, but does not require a financial institution to ask about it specifically. This provision is meant to address potential concerns about reporters spending time on complex, fact-specific questions and unintentionally misreporting this data point, which could occur if financial institution staff have to determine what kind of address they are reporting based on insufficient information. The Bureau believes that this option will be particularly helpful if the application is denied or withdrawn early in the application process before the nature of any address provided by the applicant is clear.

Requiring financial institutions to inquire as to the address where the proceeds will be applied, as some commenters requested, might result in slightly more proceeds addresses being reported. However, the Bureau does not believe that the extra information reported in certain instances would be worth the extra difficulty across all small business applications. In addition, the Bureau believes that the waterfall approach in collecting census tract data provides sufficient flexibility; making use of the waterfall voluntary, as some commenters suggested, would result in less useful information being collected while only reducing difficulty by a small amount. In regard to the comment asking whether the physical or mailing address or location should be used, the Bureau notes that the credit proceeds will be applied at a physical location, and the main office or headquarters of a business will also occupy a physical location. The third option in the waterfall, "another address or location," does not suggest the nature of such an address, but the financial institution will need to have enough information to determine a census tract for that location.

As explained above, the Bureau understands that CRA currently requests reporting of a census tract based on the

[657] As explained below, the current CRA rulemaking envisions replacing small business and small farm CRA data collection with the 1071 data collection, but in the event CRA data is still reported under the current regime for some period of time after compliance with this rule is required, the Bureau believes that the ability to report the same data in the interim should reduce any operational difficulties related to census tract. *See* 87 FR 33884, 33997, 34005 (June 3, 2022).

address or location where the proceeds of the credit will be principally applied.[658] The Bureau also believes that CRA reporting on this data point is reasonably flexible, and a financial institution will be able to coordinate the two compliance regimes to report the same census tract. The commenters who stated that this data point would conflict with CRA reporting did not explain why they believed this to be so, and other industry commenters agreed that the census tract data point for section 1071 would allow coordinated reporting with CRA. The Bureau also notes that the recent CRA interagency proposed rule, if finalized, would eventually replace CRA small business and small farm data with data collected pursuant to section 1071, in which case this issue would likely be moot.[659]

Although the Bureau sought comment on the differences between HMDA and CRA census tract reporting, no commenters provided information on this issue. In regard to commenter concerns about overlaps or conflicts with HMDA reporting, the Bureau notes that the final rule excludes HMDA-reportable transactions from coverage, as discussed in the section-by-section analysis of § 1002.104(b)(2) above, so that concern is now moot as well.

The Bureau notes that section 1071's description of the census tract data point refers to the census tract for the applicant's "principal place of business." [660] The Bureau considers the waterfall approach in final § 1002.107(a)(13) to be a reasonable interpretation of the undefined statutory term "principal place of business," which the Bureau understands not to have a standard definition, and thus believes to be ambiguous. First, the Bureau believes that the address or location of the main office or headquarters of the applicant fits easily into one of the common meanings of "principal place of business." In addition, the Bureau anticipates that, generally, the address where the loan proceeds will be applied will also be the main office or headquarters address.[661] The primary exception to this principle will be in the case of credit intended for purchase, construction/improvement, or refinancing of real property; under these circumstances, the Bureau reasonably interprets the term "principal place of business" to mean the principal location for business activities relating to the extension of credit at issue. Although "another address or location associated with the applicant" might not always be the principal place of business of the applicant, the Bureau considers this information to be the financial institution's best option for reporting data on the principal place of business when the nature of a location is unknown.

In the alternative, section 1071 authorizes the Bureau to include any "additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau has determined that requiring reporting of the proceeds address will aid in fulfilling both the fair lending and business and community development purposes of section 1071 by providing more useful information on the location of the activity financed for fair lending analysis and understanding where the business and community development is occurring. Requiring reporting of another address or location associated with the applicant when both the proceeds address and the main office or headquarters address are not available will provide location data when otherwise none would be present, thus also aiding in fulfilling both the fair lending and business and community development purposes of section 1071 by providing more useful information on location for fair lending analysis and understanding where the business and community development will likely be occurring. In addition, requiring data on the nature of the address reported will aid in fulfilling both the fair lending and business and community development purposes of section 1071 by facilitating accurate analyses of the data reported. Also, in the alternative, to the extent that "the principal place of business of the . . . applicant" is understood to mean only "main office or headquarters address" (which, as explained above, the Bureau does not adopt as its interpretation of the statutory term) the Bureau believes it is appropriate to use its exception authority under ECOA section 704B(g)(2) to provide that financial institutions in certain situations may report the proceeds address or "another address or location associated with the applicant," because the Bureau believes those addresses will carry out the purposes of section 1071 more appropriately than requiring the main office or headquarters address in every situation.

The Bureau is finalizing comment 107(a)(13)–1 through –4 with a minor edit for consistency. Comment 107(a)(13)–1 provides general instructions on using the waterfall reporting method, with examples for guidance, which will facilitate compliance.

Final comment 107(a)(13)–2 explains that a financial institution complies with § 1002.107(a)(13) by identifying the appropriate address or location and the type of that address or location in good faith, using appropriate information from the applicant's credit file or otherwise known by the financial institution. The comment also makes clear that a financial institution is not required to investigate beyond its standard procedures as to the nature of the addresses or locations it collects. The Bureau believes that this guidance strikes the right balance by allowing flexibility in reporting, and also requiring appropriate good faith compliance in exercising that flexibility, thereby yielding quality data. In regard to commenters' concerns about reporting census tract when there are multiple proceeds addresses, the Bureau notes that the rule requires reporting using the address where the proceeds will be or would have been *principally* applied, and allows for other addresses to be used if that address is unknown. As final comment 107(a)(13)–2 makes clear, as long as a financial institution determines which address to use in good faith, it will be in compliance with the rule. The Bureau believes that including detailed instructions on how to determine which proceeds address to report would increase the difficulty of reporting while only marginally enhancing the quality of the data reported. In regard to the comment about what to report when the proceeds or other address changes, because comment 107(a)(13)–2 requires that the address/location be identified in good faith, an address that the financial institution knows is no longer accurate

[658] *See, e.g.,* Off. of the Comptroller of Currency, Fed. Rsrv. Sys., Fed. Deposit Ins. Corp., *Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance,* 81 FR 48506, 48551–52 (July 25, 2016).

[659] *See* 87 FR 33884, 33997, 34005 (June 3, 2022).

[660] ECOA section 704B(e)(2)(E).

[661] According to U.S. Census 2019 SUSB data, there are 6,081,544 firms with fewer than 500 employees (which will be used, for this purpose, as a rough proxy for a "small business"); those firms collectively have 6,588,335 establishments (*i.e.,* locations). This means that, at most, approximately 8 percent of firms with fewer than 500 employees could have more than one location. *See* U.S. Census Bureau, *2019 SUSB Annual Datasets by Establishment Industry* (Feb. 2022), *https://www.census.gov/programs-surveys/susb/data/tables.html.* According to the U.S. Census Bureau's Non-employer Statistics, there are 27,104,006 non-employer establishments (regardless of revenue size). Non-employer firms account for fewer than 4 percent of all sales, though, and the vast majority are sole proprietorships. While not impossible, the Bureau believes it is very unlikely that non-employer firms would have more than one location. *See* U.S. Census Bureau, *All Sectors: Nonemployer Statistics by Legal Form of Organization and Receipts Size Class for the U.S., States, and Selected Geographies: 2019* (2019), *https://data.census.gov/cedsci/table?q=NONEMP2019.NS1900NONEMP&tid=NONEMP2019.NS1900NONEMP&hidePreview=true.*

would not be appropriate to use in determining the census tract when a more accurate address is available.

Final comment 107(a)(13)–3 explains that pursuant to final § 1002.107(c)(1) a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes at least one address or location for an applicant for census tract reporting. However, the comment further explains that if a financial institution is nonetheless unable to collect or otherwise determine any address or location for an application, the financial institution reports that the census tract information was ''not provided by applicant and otherwise undetermined.'' Based on the Bureau's understanding of financial institutions' application procedures, the Bureau believes it is highly unlikely that a financial institution will not obtain some type of address for the applicant. Nonetheless, the Bureau permits financial institutions to report this data point using the ''not provided by applicant and otherwise undetermined'' response in order to facilitate compliance in those rare instances when the financial institution does not have the data requested. The reference in the comment to final § 1002.107(c)(1) makes clear, however, that a financial institution must maintain procedures reasonably designed to collect at least one address. As with the previous comment, the Bureau believes that this comment strikes the right balance by facilitating compliance and also emphasizing the requirement to collect appropriate data.

Final comment 107(a)(13)–4 cross-references a safe harbor the Bureau is finalizing in § 1002.112(c)(2), which states that an incorrect entry for census tract will not be a violation of ECOA or subpart B if the financial institution obtains the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau. See the section-by-section analysis of § 1002.112(c)(2) below for additional discussion of this safe harbor. In regard to commenters' requests for a new Federal geocoding tool that allows for batch processing, the Bureau continues to explore this option.

Finally, as discussed above, some commenters were concerned about reidentification risk in regard to census tract reporting, especially when combined with NAICS industry codes and other data, and especially in rural areas. The Bureau appreciates concerns regarding the potential re-identification risk posed by the publication of unmodified census tract data. Accordingly, the Bureau believes that, if it decides to publish census tract, modification may be appropriate to mitigate potential re-identification risk to small business applicants and related natural persons. The Bureau notes that it will consider carefully what data will be publicly released, and will carefully protect applicant privacy, while preserving the utility of the dataset. See part VIII.B.6.xi below for discussion of this issue.

107(a)(14) Gross Annual Revenue

Proposed Rule

Section 1071 requires financial institutions to collect and report ''the gross annual revenue of the business in the last fiscal year of the . . . applicant preceding the date of the application.''[662]

Proposed § 1002.107(a)(14) would have required reporting of the gross annual revenue of the applicant for its preceding full fiscal year prior to when the information is collected. The Bureau proposed to require reporting of a specific value for gross annual revenue—rather than a range—to simplify the reporting of gross annual revenue information for financial institutions and because it believed that a precise value would be more useful for data users, including the Bureau.

Proposed comment 107(a)(14)–1 would have clarified that a financial institution need not verify gross annual revenue information provided by the applicant to comply with proposed § 1002.107(a)(14), as some small entity representatives and other stakeholders suggested. The proposed comment would have explained that the financial institution may rely on statements of or information provided by the applicant in collecting and reporting gross annual revenue. The proposed comment would have also stated, however, that if the financial institution verifies the gross annual revenue provided by the applicant, it must report the verified information. The Bureau believed that a requirement to verify gross annual revenue could be operationally difficult for many financial institutions, particularly in situations in which the financial institution does not collect gross annual revenue currently. The Bureau also did not believe that such a requirement was necessary in fulfilling either of section 1071's statutory purposes. However, the Bureau believed that reporting verified gross annual revenue when the financial institution already possesses that information would not be operationally difficult and would enhance the accuracy of the information reported.

[662] ECOA section 704B(e)(2)(F).

Proposed comment 107(a)(14)–1 would have also provided specific language that a financial institution could use to ask about an applicant's gross annual revenue and would have explained that a financial institution could rely on the applicant's answer. The Bureau believed this language would facilitate compliance for financial institutions that currently do not collect gross annual revenue, collect it only in limited circumstances, or would otherwise find its collection challenging, as some small entity representatives and other stakeholders suggested.

Overall, the Bureau believed that this approach in proposed comment 107(a)(14)–1—clarifying that a financial institution need not verify applicant-provided gross annual revenue information and providing language that a financial institution may use to ask for such information—should reduce the complexity and difficulty of collecting gross annual revenue information.

The Bureau believed that situations could arise in which the financial institution has identified that an applicant is a small business for the purposes of proposed § 1002.106(b) through, for example, an initial screening question asking whether the applicant's gross annual revenue is below $5 million, but then the specific gross annual revenue amount could not be collected. Therefore, the Bureau proposed comment 107(a)(14)–2, which would have first clarified that pursuant to proposed § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, including the gross annual revenue of the applicant. The proposed comment would have then stated that if a financial institution is nonetheless unable to collect or determine the specific gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is ''not provided by applicant and otherwise undetermined.'' The Bureau believed that permitting this reporting flexibility would reduce the complexity and difficulty of reporting gross annual revenue information, particularly when an application has been denied or withdrawn early in the process and the gross annual revenue could not be collected.

Proposed comment 107(a)(14)–3 would have clarified that a financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. The proposed comment would have stated that, for example, if the financial institution does not normally collect information on affiliate revenue, the financial institution reports only the applicant's revenue and does not include the revenue of any affiliates when it has not collected that information. The Bureau believed that permitting, but not requiring, a financial institution to include the revenue of affiliates will carry out the purposes of section 1071 while reducing undue burden on financial institutions in collecting gross annual revenue information. Proposed comment 107(a)(14)–3 would have concluded by explaining that in determining whether the applicant is a small business under proposed § 1002.106(b), a financial institution may rely on an applicant's representations regarding gross annual revenue, which may or may not include affiliates' revenue. This approach regarding affiliate revenue in proposed comment 107(a)(14)–3 was consistent with the approach regarding affiliate revenue for purposes of determining whether an applicant is a small business under proposed § 1002.106(b). The Bureau believed that this operational equivalence between proposed § 1002.107(a)(14) and proposed § 1002.106(b) would facilitate compliance and enhance the consistency of the data.

In the NPRM, the Bureau expressed skepticism regarding some small entity representatives' suggestions to allow estimation or extrapolation of gross annual revenue based on partially reported revenue, noting, for example, that a seasonal business's bank statements for its busy season would likely yield an inflated gross annual revenue when extrapolated to a full year. The Bureau sought comment on whether financial institutions should be permitted to estimate or extrapolate gross annual revenue from partially reported revenue or other information, and how such estimation or extrapolation would be carried out. The Bureau also noted that estimation or extrapolation of gross annual revenue would be sufficient for the purposes of determining small business status under proposed § 1002.106(b), subject to the requirement under proposed comment 107(a)(14)–1 that a financial institution must report verified gross annual revenue information if available.

The Bureau sought comment on its proposed approach to the gross annual revenue data point, as well as the specific requests for comment above. As the SBREFA Panel recommended, the Bureau also sought comment on how the timing of tax and revenue reporting can best be coordinated with the collection and reporting of gross annual revenue. In addition, the Bureau sought comment on the effect of cash flow versus accrual accounting on reporting of gross annual revenue.

Comments Received

The Bureau received comments on its proposed approach to the gross annual revenue data point from a range of lenders, trade associations, and community groups. With the exception of several agricultural lenders, industry commenters generally did not object to the Bureau's proposal to require the collection and reporting of gross annual revenue as required by ECOA section 704B(e)(2)(F) and three commenters (two community groups and a lender) expressed support for the proposed gross annual revenue data point. One of the community groups asserted that the gross annual revenue of the small business is a critical data element since research shows that smaller businesses are less likely to receive loans and that this data point is needed to assess whether banks are meeting credit needs of small businesses. The other community group remarked that it was critically important to allow for analysis looking at smaller buckets of small businesses based on gross revenue.

Several agricultural lenders, echoing comments from a major agricultural credit trade association, argued that the Bureau should not require the collection or reporting of gross annual revenue information for agricultural credit and urged the Bureau to use its exception authority to eliminate this data point for agricultural credit. The commenters argued that collecting gross annual revenue information would pose substantial challenges for them given the prevalence of the ''non-standard'' agricultural borrower, including the majority of farmers who only farm on a part-time basis, and because many agricultural loans are currently decisioned with principal reliance on credit scoring systems, without considering revenue from farming or off-farm income. One agricultural lender explained that its underwriting standards include personal W–2 and other off-farm income, arguing that inclusion of that information in reporting this data point would be misleading as to the size of the business applying for a loan because off-farm income is not truly business income. The same commenter asserted that if, on the other hand, the off-farm income is not reported, the data would be misleading as they would show many loans approved to farmers with low business revenue (where they have sufficient personal income) and other loans denied to farmers with higher business revenue (because of insufficient personal income). Another commenter noted it was unclear how to calculate gross annual revenue for many agricultural credit transactions because for both estate planning and asset preservation purposes, many family farms are set up using complex business entities consisting of multiple trusts, corporations, partnerships, and limited liability entities, and that this means that the applicant signing the note may differ from the denoted mortgagors and guarantors, but all of whom are family members or business entities they own. Many of these agricultural lenders suggested that instead of gross annual revenue information, the appropriate metric for agricultural credit should be ''gross sales of agricultural or aquatic products'' as defined by the Farm Credit Administration in the prior year.

Some bank commenters suggested the Bureau align with other reporting regimes (such as HMDA and CRA) by adopting a definition of gross annual revenue based on annual revenue relied upon to make the credit decision. Several explained inconsistencies among regulatory approaches to gross annual revenue, pointing out the Bureau's proposal would require collecting gross annual revenue from the preceding fiscal year, whereas HMDA reporting requires use of the income considered in making the credit decision and the CRA utilizes gross annual revenue used to make the credit decision. Several commenters asserted that using a prior year's gross annual revenue would be problematic for many small businesses that cannot produce usable financial statements, including tax returns, immediately upon the close of a fiscal year. One such commenter elaborated that tax returns, which are often the only available income statements, may not be ready until September, resulting in many lenders relying on a tax return from two years ago or using a pro forma revenue outline. Another bank commenter asserted that using similar, but differently defined, data points between section 1071 and CRA would complicate the reporting process and could be avoided by aligning the definitions. One commenter recommended aligning with CRA for originated loans by using gross annual revenue used to make the credit decision, but for non-originated loans (which are not reported under the CRA) using gross annual revenue information that has been provided by applicants absent credit decisions (such as in cases of some withdrawn or incomplete applications).

Some commenters provided market intelligence related to the collection of gross annual revenue data. A trade association stated that collecting gross annual revenue information can be complicated because many small businesses have loan guarantors and co-borrowers. Another trade association explained that in the vehicle financing context, the borrower employee who is responsible for acquiring the vehicle may not be familiar with the total revenue of the company and the owner(s) of the company may not want to share this information with all employees. A few industry commenters stated that there are many instances where gross annual revenue information is not collected in the normal course of business because underwriting may be based on other factors such as a cash flow analysis, net income, or debt-to-service ratio. For this reason, one of these commenters stated that it should be clear that applicants have no obligation to provide gross annual revenue information. Another asserted that where an applicant declines to provide gross annual revenue information, the Bureau is creating a significant regulatory challenge for the financial institution by requiring it to submit application-level information when it will not know for certain whether the business is a small business nor have any reliable way of obtaining gross annual revenue information absent a third-party provider, which do not exist for many industries. Conversely, a community group stated that gross annual revenue was likely to be collected as part of the underwriting process.

A number of industry commenters requested clarification regarding how to report gross annual revenue information. A few commenters requested guidance regarding appropriate sources for gross annual revenue information. One bank commenter requested consistency in what defines gross annual revenue and asked whether gross sales listed on a tax return constitute an acceptable source for this information. Another commenter asked the Bureau to delineate whether tax returns, accountant prepared financial statements, or internal profit and loss statements constitute acceptable source documentation.

Several industry commenters asked for guidance or made suggestions regarding how to calculate gross annual revenue. One asked whether the Bureau intends for gross annual revenue to be defined as the total of all income (account credits) for the year before subtracting any expenses (account debits). Another asked whether, in the case of a business that uses a calendar year for its fiscal year and applies for a loan early in the next fiscal year with many unknown numbers related to the prior fiscal year, the applicant should provide an estimate or whether the applicant should provide the information from the next preceding fiscal year. Two commenters suggested that the Bureau clarify that different business units within the financial institution may use different methods to determine gross annual revenue, as long as the methods are used consistently within each business unit. Another asked if, in the case of an applicant that owns two or more businesses, the financial institution should only collect and report the gross annual revenue of the business being financed and not combined revenues of all owned businesses.

A number of industry commenters asked for clarification and made suggestions regarding how to report gross annual revenue for a startup business, a new line of business, or a business with a change in structure or ownership. A few commenters asked whether "zero" and/or "not available" is an acceptable response for a startup business. One commenter urged the Bureau to define gross annual revenue in a straightforward manner that does not impact credit opportunities (nor compliance) for newly formed businesses that do not have historical gross annual revenue. Another commenter suggested the Bureau address or exempt new businesses from section 1071 reporting. Two commenters asked whether "zero" or "not provided by applicant and otherwise undetermined" should be reported when a borrower is establishing a new line of business but already has revenue in other businesses; one also asked if treatment should differ based on whether or not the new business line was in the same industry as the existing businesses. A bank commenter opined that for a start-up business, the financial institution should use the actual gross annual revenue to date (including the reporting of $0 if a new business has had no revenue to date) and that pro-forma projected revenue figures should not be reported since these figures do not reflect actual gross revenue. Another bank commenter suggested the Bureau develop FAQs and other documents that applicants can consult to help them determine what number to supply for gross annual revenue, particularly when a business is starting up or establishing a new business line. Another industry commenter asked how to handle situations where there is a change in structure or ownership of the business and it is unclear how the gross annual revenue should apply to the applicant.

Two industry commenters specifically suggested changes related to how to report the gross annual revenue of single purpose entities and other real estate financing vehicles. Both suggested allowing a financial institution to rely on the gross annual revenue generated by the property or the applicant's projected gross annual revenue for purposes of determining the small business status of the applicant. One also suggested specific revisions to the commentary to incorporate its suggestions.

The Bureau also received some general comments regarding the treatment of gross annual revenue information from an applicant's affiliate. A trade association expressed support for the Bureau's proposal to clarify that a financial institution need not verify gross annual revenue information provided by the applicant and is permitted—but not required—to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. Two community group comments urged the Bureau to require reporting on the gross annual revenue of parent companies and beneficial owners of limited liability companies in order to avoid obfuscating extensive property ownership.

Some industry commenters provided suggestions regarding how to handle gross annual revenue information from the parent companies or affiliates of applicants. A bank inquired whether revenue or income relied upon from co-signers or guarantors that are not affiliates of the borrower should be factored into the gross annual revenue determination. A group of trade associations suggested specific technical revisions to the commentary for clarity. Two bank commenters noted there may be inconsistencies in the data where one institution looks like it is lending more to small(er) businesses because it opts not to include gross annual revenue of affiliates. Two other commenters asked that reportable gross annual revenue be the gross annual revenue of both the applicant and all of its affiliates. A bank recommended the Bureau further explain how to handle situations where the applicant is using multiple owned businesses/affiliates to support sufficient cashflow, and whether there are repercussions for excluding/including multiple revenues used in the credit decision. A group of trade associations representing the commercial real estate industry asked the Bureau to provide additional guidance on what types of entities may be affiliates of an applicant, *e.g.,* as a result of common ownership or common control. Another trade association suggested that the Bureau make minor revisions to commentary to clarify that a lender that does not collect affiliate revenue in all transactions is not precluded from collecting affiliate revenue in some transactions.

A few commenters specifically asked for clarity regarding the treatment of real estate affiliate revenue. These commenters explained that many of their loans are to real estate investors who often form and apply through a single-purpose limited liability company that has no gross annual revenue (and therefore would meet the proposed definition of a small business) but that may be affiliates of many other single-purpose limited liability companies and individual owners. These commenters noted that they typically underwrite these loans based on a schedule of other real estate in which the single purpose entity (or its sponsor) has an ownership interest and by using a global debt coverage calculation that considers the combined income of the applicant and all affiliated businesses, which can often exceed $5 million annually. A group of trade associations representing the commercial real estate industry stated that under the SBA's general principles of affiliation, the single purpose entities that own that other real estate would be affiliates of the applicant single purpose entity, because of the overlapping ownership interest. They also stated that the single purpose entities on the schedule of real estate could additionally be affiliates of the applicant single purpose entity where one or more officers, directors, managing members, or partners controls the board of directors or management of both the applicant single purpose entity and the single purpose entities on the schedule of real estate. A bank asked the Bureau to clarify that such businesses should be determined to be "small businesses" for which data collection and reporting is required only if the combined income of the business and its related affiliates does not exceed the threshold set. The group of trade associations suggested revisions to the commentary that, in the case of single purpose entities, would allow a financial institution to consider the owners of any real property listed on a schedule of real estate as affiliates of the applicant and would also, under certain circumstances, allow a financial institution to estimate the gross annual revenue of any income-producing real property for purposes of determining an applicant's small business status. They also suggested that for an applicant that is a newly created single purpose entity, a financial institution should be permitted to apply the $5 million gross annual revenue threshold to either the gross annual revenue of the property for its most recent fiscal year under its prior owner or the single purpose entity's projected gross annual revenue.

Some commenters asked for guidance or argued in favor of using estimates and extrapolations when exact gross annual revenue information is unavailable. A bank asked if using an estimate was permitted when the applicant does not have prior fiscal year information completed. Another commenter suggested that when an applicant does not provide information regarding its gross annual revenue but that applicant's revenue is tracked through a technology company's online platform (*e.g.,* its sales on the company's online marketplace), a covered financial institution should be able to report gross annual revenue based on revenue information obtained from the platform data. The commenter argued that permitting use of this alternative data point would serve the purposes of section 1071 by enabling technology companies to collect and report information on a greater number of applications, while also reducing the compliance burden for financial institutions. Two commenters argued that for consistency, the Bureau should allow financial institutions to extrapolate or estimate an applicant's gross annual revenue, claiming that the Bureau proposed to allow *institutions* (not just applicants) to rely on extrapolated or estimated revenue data for determining whether or not a business is a small business.

Many industry commenters supported the Bureau's proposal to permit financial institutions to rely upon gross annual revenue information provided by the applicant without any requirement to verify. Many of these commenters noted that they do not currently collect gross annual revenue information with every application and even if it is collected, they do not always verify the amount provided, as underwriting is often based on other factors such as a cash flow analysis or debt-to-service ratio. One commenter noted that the flexibility to use the gross annual revenue provided by the applicant and without verification allows financial institutions to continue using current, proven underwriting practices and does not add to the compliance burden by requiring additional revenue verification steps.

The Bureau received some general comments regarding its proposal to not require verification of gross annual information but to require reporting of verified information when available. Two banks requested further clarification regarding the meaning of "verification," one of whom argued that neither the identification and assessment of income figures (not the same as gross annual revenue) by a financial institution during the underwriting and credit decision process nor the post-origination independent testing and validation of the small business data file should be considered "verification." The other bank stated that exact gross annual revenue information is not always known until a tax return is completed and asked if the self-reported gross annual revenue information should be reported or the information found later on the tax return.

Two community groups urged the Bureau to require the verification of gross annual revenue information. One noted that tax returns are generally available and can be used to confirm the applicant's gross annual revenue information. The other asserted that because the accuracy of determining whether credit needs of small businesses are being met hinges on the accuracy of collecting and reporting the revenue size of the business and because using tax documents or cash flow information makes it feasible for the lender to verify annual revenue, the Bureau should require the verification of gross annual revenue information. This community group argued that if affiliates are not accounted for in data collection, the data could include businesses that exceed the revenue limits established by the Bureau, thereby reducing the efficacy of the data in reporting on the experiences of small businesses in the lending marketplace. The commenter suggested that the Bureau thus investigate this issue and determine whether there are feasible methods a lender can use to identify the presence of affiliates.

Some industry commenters suggested the Bureau provide a safe harbor and/or remove its proposed requirement to report verified gross annual revenue information. Commenters requested the Bureau specify that the financial institution has no responsibility to verify the number supplied by the applicant. A few commenters also suggested the Bureau institute a safe harbor to ensure that whatever gross annual revenue number is supplied by the applicant can be reported. Commenters urged the Bureau to clarify that a financial institution is not liable for misinterpretation in answering questions or providing information to the applicant beyond the proposed gross annual revenue question. One commenter suggested that if it is the lender's practice to revise the application information in its system to reflect what it believes to be a verified number, the Bureau should permit the lender to report the verified number retained in its system, rather than requiring the lender to maintain both numbers in its system. This commenter also argued that a lender's verification of revenue should not result in the lender being required to change the applicant's self-classification as being a small business or not being a small business because the determination of whether or not an applicant is a "small business" needs to be made by the applicant at the time of application.

Several community groups and a CDFI lender expressed support for reporting gross annual revenue as a specific dollar amount rather than in ranges. These commenters emphasized the importance of having precise and accurate data on gross annual revenue because this information is a fundamental determinant of whether a business is deemed to be small and all of its attendant information is captured and collected as part of the 1071 dataset. One commenter argued gross annual revenue in discrete units rather than bands was needed to assess the availability of credit to the smallest businesses, especially those owned by women and people of color. Another commenter asserted that revenue categories should be more detailed than those in the CRA small business loan data because research revealed the inadequacies with the CRA classifications since businesses with revenues below $500,000 had markedly less access to loans than businesses with revenues above this amount. This commenter argued in the alternative that should the Bureau adopt a range for gross annual revenue, it should select the mid-point with $10,000 increments as a continuous variable as the most accurate for capturing experiences of the range of small businesses in the lending marketplace.

With regard to the time frame for usability of gross annual revenue information, a bank stated that gross annual revenue information should only be usable for one fiscal year. A trade association suggested that financial institutions not be required to re-request gross annual revenue for new credit applications when they can rely on their records from previous transactions.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(14) and associated commentary with revisions for clarity and consistency. Final § 1002.107(a)(14) requires reporting of the applicant's gross annual revenue for its preceding fiscal year. The Bureau is requiring that financial institutions report a specific value for gross annual revenue—rather than a range—to simplify the reporting of gross annual revenue information for financial institutions and because it believes a precise value is more useful for data users, including the Bureau. However, the Bureau has not yet determined how it will publish gross annual revenue data in the dataset. The Bureau will consider whether modification techniques, such as ranges, may be appropriate after it conducts its full privacy analysis. See part VIII below for further discussion about the privacy analysis and public disclosure of data.

The Bureau is not categorically exempting agricultural credit from the requirement to collect and report gross annual revenue, as requested by some commenters. The Bureau understands, as noted by commenters, that most farmers in this country farm on a part-time basis and that the gross annual revenue data point may pose challenges given the prevalence of "non-standard" agricultural borrowers such as customers applying jointly despite having separate farming operations. The Bureau also understands from commenters that many Farm Credit System lenders decision applications without either considering off-farm income or revenue from farming; instead, lenders rely principally on credit scoring systems. Nevertheless, the Bureau believes that omitting the gross annual revenue data point for agricultural credit transactions would introduce inconsistency in data collected across different industries and would not support section 1071's statutory purposes. The Bureau notes that data users will be able to identify agricultural credit transactions using the reported 3-digit NAICS code and make any necessary adjustments in their analyses to account for particularities unique to agricultural industries. The Bureau also believes, as discussed below, that the suggested gross annual revenue question in final comment 107(a)(14)–1 will facilitate compliance for agricultural lenders that currently do not collect gross annual revenue, particularly because the financial institution may rely on the applicant's answer. As discussed above in the section-by-section analysis of § 1002.106(b), the Bureau does not believe that "gross sales of agricultural or aquatic products" in the prior year would be an appropriate metric for agricultural credit in this final rule, nor that this should form the basis for a separate small business definition for agricultural businesses.

The Bureau has considered the comments regarding the collection and reporting of gross annual revenue and it believes its approach in final comment 107(a)(14)–1—clarifying that a financial institution need not verify applicant-provided gross annual revenue information, and providing language that a financial institution may use to ask for such information—will reduce commenters' concerns regarding complexity and difficulty of collecting gross annual revenue information.

Final comment 107(a)(14)–1 clarifies that a financial institution reports the applicant's gross annual revenue for the fiscal year preceding when the information was collected. The Bureau believes this will clarify the timing requirements for collection of the gross annual revenue data point. The final comment provides specific language that a financial institution may use to ask about an applicant's gross annual revenue and explains that a financial institution may rely on the applicant's answer (unless subsequently verified or updated), even if the applicant's statements or information is based on estimation or extrapolation. The Bureau believes this language will facilitate compliance for financial institutions that currently do not collect gross annual revenue, collect it only in limited circumstances, or would otherwise find its collection challenging, as some commenters suggested.

Final comment 107(a)(14)–1 also clarifies that a financial institution need not verify gross annual revenue information provided by the applicant to comply with final § 1002.107(a)(14). The comment explains that the financial institution may rely on the applicant's statements or on information provided by the applicant in collecting and reporting gross annual revenue. The comment also states, however, that if the financial institution verifies the gross annual revenue provided by the applicant it must report the verified information. The Bureau understands, as noted by industry commenters, that a requirement to verify gross annual revenue would be operationally difficult for many financial institutions, particularly in situations in which the financial institution does not currently collect gross annual revenue. The Bureau does not believe that such a requirement is necessary to fulfill either of section 1071's statutory purposes. However, the Bureau believes that reporting verified revenue when the financial institution already possesses that information will not be operationally difficult and will enhance the accuracy of the information collected. For the same reasons and for the reasons outlined in its discussion of final comment 107(c)–5, the Bureau is clarifying in final comment 107(a)(14)–1 that a financial institution reports updated gross annual revenue data if it obtains more current data from the applicant during the application process. The comment states that if this updated information is on data the financial institution has already verified, the financial institution reports the information it believes to be more accurate, in its discretion.

With respect to the suggestions that the Bureau further clarify the meaning of ''verify,'' the Bureau believes that additional specificity in the rule itself could unnecessarily constrain financial institutions. The Bureau interprets the word ''verification'' to mean the intentional act of determining the accuracy of information provided, in this case for the purpose of processing and underwriting the credit application, and potentially changing that information to reflect the determination. Gross annual revenue information that may or may not be more accurate than applicant-provided data and is not part of a financial institution's verification of the file's applicant-provided data or used by the institution in processing or underwriting the application need not be reported. The Bureau agrees with the commenter who stated that post-origination independent testing and validation of the small business data file does not constitute ''verification.'' In situations where a financial institution verifies only a portion of the small business's provided gross annual revenue figure (perhaps because the institution is relying on that portion for its credit decision), the financial institution has not verified the entire gross annual revenue amount provided by the applicant, and it may continue to rely on the applicant's statement or information, and it need not report the partially verified information.

The Bureau does not believe it would be appropriate to use a definition of gross annual revenue for this rule based on the annual revenue relied upon to make the credit decision. Given both the statutory language requiring the collection and reporting of ''the gross annual revenue of the business in the last fiscal year'' and section 1071's statutory purposes, the Bureau believes that using the small business's entire gross annual revenue, which may differ from revenue relied upon in making the credit decision, is the better approach to implement this data point in final § 1002.107(a)(14). Moreover, the Bureau notes that—unlike for this final rule—a business's gross annual revenue is not determinative of either HMDA or CRA coverage. Here, the Bureau believes it is important to obtain the applicant's entire gross annual revenue for more accurate identification of business and community development needs and opportunities. The Bureau thus agrees with commenters that gross annual revenue data are important to assess the availability of credit to the smallest firms, especially those owned by women, minorities, and LGBTQI+ individuals. Moreover, for credit transactions that are underwritten without consideration or collection of a small business's gross annual revenue, no information would be reported for this data point under a relied-upon standard. Lastly, the Bureau believes it important to ensure that the gross annual revenue figure used to determine small business status is the same total figure as the gross annual revenue reported for the data point. Using different figures could create data discrepancies and disconnects and would ultimately result in greater compliance risk for financial institutions.

In addition, the Bureau does not believe that financial institutions need a safe harbor to ensure that whatever gross annual revenue number is supplied by the applicant can be reported or that it would be appropriate to remove the requirement to report verified gross annual revenue information when the financial institution in fact verifies it. Final comment 107(a)(14)–1 already clarifies that a financial institution need not verify gross annual revenue information provided by the applicant to comply with final § 1002.107(a)(14) and thus a safe harbor is not necessary to allow reporting of the gross annual revenue number supplied by the applicant. As one commenter explained, some financial institutions already revise application information in their systems with a verified gross annual revenue number and thus the Bureau does not believe that reporting verified revenue when the financial institution already possesses that information will be operationally difficult. In such situations, the financial institution may report the verified number retained in its system and is not required to maintain both numbers in its system. Moreover, the Bureau agrees with the commenter who stated that the accuracy of determining whether the credit needs of small businesses are being met hinges on collecting and reporting the revenue size of the business and thus the Bureau believes that reporting verified revenue when available will enhance the accuracy of the information collected.

With respect to requests for guidance from commenters regarding acceptable sources of gross annual revenue information, the Bureau does not believe it would be appropriate to require the use of any specific documentation. However, the Bureau notes that gross annual revenue information can be reasonably derived from a variety of sources including tax returns, accountant-prepared financial statements, internal profit and loss statements, cash flow analyses, or any type of business income documentation that the financial institution reasonably relies on in the normal course of business.

With respect to comments regarding how to calculate gross annual revenue, the Bureau notes that the suggested applicant question in final comment 107(a)(14)–1 states that gross annual revenue is the amount of money the business earned before subtracting taxes and other expenses. The comment further states that an applicant may provide gross annual revenue calculated using any reasonable method. Different business units within the financial institution may use different methods to ascertain gross annual revenue, as long as the methods are used consistently within each business unit.

The Bureau believes that situations could arise in which the financial institution has identified that an applicant is a small business for the purposes of final § 1002.106(b) through, for example, a screening question asking whether the applicant's gross annual revenue is $5 million or less, but then the financial institution is unable to collect or determine a specific gross annual revenue amount. Therefore, the Bureau is finalizing comment 107(a)(14)–2 substantively as proposed. The comment first clarifies that pursuant to final § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, including the gross annual revenue of the applicant. The final comment then states that if a financial institution is nonetheless unable to collect or determine the specific gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is ''not provided by applicant and otherwise undetermined.'' The

Bureau believes that permitting this reporting flexibility will reduce the complexity and difficulty of reporting gross annual revenue information, particularly when an application has been denied or withdrawn early in the process and gross annual revenue could not be collected.

The Bureau is finalizing comment 107(a)(14)–3 with minor revisions for clarity and consistency. The Bureau is adopting commenters' suggestions to add a cross reference to comment 106(b)(1)–3 and to remove an example provided in the proposed commentary for additional clarity. This example would have provided that if the financial institution does not normally collect information on affiliate revenue, the financial institution reports only the applicant's revenue and does not include the revenue of any affiliates when it has not collected that information. The Bureau shares the commenter's concern that this comment may be interpreted to preclude a financial institution that does not collect affiliate revenue in all transactions from collecting affiliate revenue in some transactions and believes the comment is sufficiently clear without this example.

Final comment 107(a)(14)–3 also clarifies that a financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. For example, if the financial institution has not collected information on affiliate revenue, the financial institution reports only the applicant's revenue and does not include the revenue of any affiliates. The Bureau is adopting suggested revisions to comment 107(a)(14)–3 and additionally notes that a financial institution that does not collect affiliate revenue in all transactions is not precluded from collecting affiliate revenue in some transactions. The Bureau believes this comment is responsive to one commenter's question about how to report gross annual revenue for an applicant with two businesses because it permits, but does not require, reporting of gross annual revenue for an applicant that includes the revenue of affiliates, which may include a business with common ownership. Final comment 107(a)(14)–3 concludes by explaining that in determining whether the applicant is a small business under proposed § 1002.106(b), a financial institution may rely on an applicant's representations regarding gross annual revenue, which may or may not include affiliates' revenue. The Bureau noted that final comment 106(b)–3 follows the same approach to affiliate revenue for purposes of determining whether an applicant is a small business under final § 1002.106(b). The Bureau believes that this operational equivalence between final § 1002.107(a)(14) and final § 1002.106(b) will facilitate compliance and enhance data consistency.

The Bureau recognizes, as noted by commenters, that there may be inconsistencies in the data where one financial institution looks like it is lending more to small(er) businesses as it opts not to include gross annual revenue of affiliates versus another financial institution that opts to include such revenue when it reports the gross annual revenue of an applicant. However, the Bureau is not requiring reporting of the gross annual revenue of both the applicant and all of its affiliates, nor is it requiring reporting of revenue for parent companies and beneficial owners of limited liability companies. The Bureau believes that permitting, but not requiring, a financial institution to include the revenue of affiliates will carry out the purposes of section 1071 while reducing undue burden on financial institutions in collecting gross annual revenue information. The Bureau considered whether there are feasible methods to identify the presence of affiliate revenue, as a commenter suggested, but ultimately has determined that such an identifier could interfere with allowing a financial institution to rely on an applicant's self-reported gross annual revenue information and, in any case, would introduce additional complexity into reporting. In response to a question about whether revenue or income relied upon from co-signers or guarantors that are not affiliates of the applicant should be factored into the gross annual revenue determination, the Bureau notes that the final rule only *requires* the collection and reporting of gross annual revenue of the *applicant.*

The Bureau understands there may also be instances, as indicated by one commenter, where the applicant may use multiple owned businesses/affiliates to support sufficient cashflow, and in those instances, a financial institution may rely on an applicant's representations regarding gross annual revenue that include affiliates' revenue. For additional guidance on what types of entities may be affiliates of an applicant, *e.g.,* as a result of common ownership or common control, see the section-by-section analyses of §§ 1002.102(a) and 1002.106(b).

The Bureau has considered the comments regarding the treatment of real estate affiliate revenue, but is not adopting revisions to, in the case of single purpose entities, allow a financial institution to categorize all owners of any real property listed on an applicant's Schedule Of Real Estate Owned as affiliates of the applicant. The Bureau is likewise not adopting revisions to allow a financial institution to estimate or project the gross annual revenue of any income-producing real property for purposes of determining the applicant's small business status. The Bureau agrees that under the SBA's general principles of affiliation, "common investments" affiliation can be based on shared investments in or joint ownership of real estate.[663] Thus, the owners of real estate that is also owned by the applicant may be affiliates of the applicant. However, the Bureau is not adopting the suggested revisions to commentary because affiliate determinations are inherently fact-specific and rebuttable,[664] and the Bureau does not believe it would be appropriate to categorize all entities as affiliates based on a form listing.

The Bureau has considered the comments regarding whether financial institutions should be permitted to estimate or extrapolate gross annual revenue from partially reported revenue or other information, and is making a minor revision in final comment 107(a)(14)–1 to emphasize a manageable method for collecting full gross annual revenue when a financial institution does not already do so. Specifically, final comment 107(a)(14)–1 clarifies that a financial institution may rely on the applicant's statements or on information provided by the applicant in collecting and reporting gross annual revenue, even if the applicant's statement or information is based on estimation or extrapolation, and that an applicant may provide gross annual revenue calculated using any reasonable method. As such, when an applicant does not yet have fiscal year information completed (a hypothetical provided by a commenter), the applicant may choose to provide its gross annual revenue using any reasonable method, including

[663] *See* 13 CFR 121.103(f) ("Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or *firms with common investments,* or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated.") (emphasis added); Small Bus. Admin., *Small Business Compliance Guide: A Guide to the SBA's Size Program and Affiliation Rules* (July 2020), *https://www.sba.gov/sites/default/files/2020-10/AFFILIATION%20GUIDE_Updated%20%28004%29-508.pdf.*

[664] *See, e.g.,* 13 CFR 121.103(f) ("Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.").

estimating or extrapolating based on a prior fiscal year's tax return. The Bureau believes that this flexibility will help address concerns from commenters that tax returns may not be immediately available upon the close of a fiscal year. As noted by another commenter, an applicant may alternatively wish to provide revenue figures generated by a technology company's online platform (*e.g.,* through sales on the company's online marketplace). The Bureau notes that under final § 1002.107(b), however, a financial institution must report verified gross annual revenue information if available. Moreover, as provided by new comment 107(c)–5, a financial institution reports updated applicant-provided data if it obtains more current data during the application process; if this updated information is on data the financial institution has already verified, the financial institution reports the information it believes to be more accurate, in its discretion.

The Bureau also wishes to clarify some apparent confusion among some commenters who claimed that the proposal would have allowed *financial institutions* to extrapolate or estimate an applicant's revenue to determine whether or not a business is a small business. The proposal indicated that financial institutions could rely on extrapolated or estimated revenue information provided by *applicants.* The Bureau is making this position clear with final comment 107(a)(14)–1. The Bureau sought comment on whether *financial institutions* should be permitted to estimate or extrapolate gross annual revenue from partially reported revenue or other information, and how such estimation or extrapolation would be carried out. On this issue, the Bureau does not believe that it would be appropriate to permit such estimation or extrapolation for the identification of small businesses about whom data collection and reporting is required, and thus financial institutions' own extrapolation or estimation should likewise not be used in reporting gross annual revenue in order to maintain consistency.

With respect to comments asking how to report gross annual revenue for a startup business, a new line of business, and/or a business with a change in structure or ownership, the Bureau is adding new comment 107(a)(14)–4, which notes that in a typical startup business situation, the applicant will have no gross annual revenue for its fiscal year preceding when the information is collected because either the startup existed but had no gross annual revenue or it simply did not exist in the preceding fiscal year. In these situations, the financial institution reports that the applicant's gross annual revenue in the prior fiscal year is "zero." The Bureau agrees with the commenter that suggested, for a start-up business, the financial institution should use the actual gross annual revenue for its preceding fiscal year (including the reporting of $0 if a new business has had no revenue to date) and that pro forma projected revenue figures should not be reported since these figures do not reflect actual gross revenue.

In situations where an applicant is establishing a new line of business but already has revenue in other businesses, such as in the case of a sole proprietor with an established in-home child-care center who now seeks financing to start a new line of business offering house-cleaning services, the Bureau notes that final comment 107(a)(14)–3 clarifies that a financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. This comment may also apply to situations where there is a change in structure or ownership of the business. In response to a question from a commenter, the Bureau does not believe that treatment of affiliate gross annual revenue information should differ based on whether or not the new business line was in the same industry as the existing businesses. The Bureau notes that according to the definition of affiliate provided in final § 1002.102(a), which refers to the SBA's rules for determining affiliation (13 CFR 121.103), affiliation is not limited to businesses in the same industry. The Bureau also notes that final § 1002.106(a) defines a business as having the same meaning as the term "business concern or concern" in 13 CFR 121.105, which expressly provides that a firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity and that the annual receipts and employees of the predecessor will be taken into account in determining size. This successor-in-interest rule would apply to situations where a business reorganized, and a new entity emerges with essentially the same assets and liabilities as the old concern.[665]

The Bureau is not exempting new businesses from having application data reported, as suggested by one commenter, because the Bureau believes that doing so would contravene section 1071's statutory purposes. The Bureau does not believe that the final rule will disproportionately impact credit opportunities (or compliance) for newly formed businesses that do not have the historical gross annual revenue. However, as suggested by a commenter, the Bureau will track questions related to collecting and reporting gross annual revenue information and may develop FAQs or other materials as necessary to help financial institutions help applicants determine what number to supply for gross annual revenue, particularly when a business is starting up or establishing a new business line.

The final rule does not permit financial institutions the option to use the gross annual revenue figures provided by an applicant for up to three years from the date of an application for which the information was gathered, as requested by one commenter. However, under final § 1002.107(d), discussed below, the Bureau is permitting financial institutions to reuse previously collected gross annual revenue information when the data were collected within the same calendar year as the current covered application. The statutory requirement is for the applicant's gross annual revenue in the last fiscal year preceding the date of the application; the Bureau does not believe that revenue information from years *prior to* the last fiscal year would satisfy this requirement.

107(a)(15) NAICS Code

Proposed Rule

The SBA customizes its size standards on an industry-by-industry basis using 1,012 6-digit NAICS codes.[666] The first two digits of a NAICS code broadly capture the industry sector of a business. The third digit captures the industry's subsector, the fourth captures the industry group, the fifth captures the industry code, and the sixth captures the national industry. The NAICS code thus becomes more specific as digits increase and the 6-digit code is the most specific.

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau proposed in § 1002.107(a)(15) to require that

[665] *See Size Appeal of Willowheart, LLC,* SBA No. SIZ–5484, at *4 (July 10, 2013).

[666] *See* U.S. Census Bureau, *North American Industry Classification System,* at 41 (2022) *https://www.census.gov/naics/reference_files_tools/2022_NAICS_Manual.pdf.* At the time of the NPRM, there were 1,057 6-digit NAICS codes. *See* U.S. Census Bureau, *North American Industry Classification System,* at 26 (2017) *https://www.census.gov/naics/reference_files_tools/2017_NAICS_Manual.pdf.*

financial institutions collect and report an applicant's 6-digit NAICS code. Proposed comment 107(a)(15)–1 would have provided general background on NAICS codes and would have stated that a financial institution complies with proposed § 1002.107(a)(15) if it uses the NAICS codes in effect on January 1 of the calendar year covered by the small business lending application register that it is reporting. Proposed comment 107(a)(15)–2 would have clarified that, when a financial institution is unable to collect or determine the applicant's NAICS code, it reports that the NAICS code is ''not provided by applicant and otherwise undetermined.''

The Bureau also proposed that financial institutions be permitted to rely on NAICS codes obtained from the applicant or certain other sources, without having to verify that information itself. Specifically, proposed comment 107(a)(15)–3 would have clarified that, consistent with proposed § 1002.107(b), a financial institution may rely on applicable applicant information or statements when collecting and reporting the NAICS code and would have provided an example of an applicant providing a financial institution with the applicant's tax return that includes the applicant's reported NAICS code. Proposed comment 107(a)(15)–4 would have provided that a financial institution may rely on a NAICS code obtained through the financial institution's use of business information products, such as company profiles or business credit reports, which provide the applicant's NAICS code.

The Bureau believed that collecting the full 6-digit NAICS code (as opposed to the 2-digit sector code) would better enable the Bureau and other stakeholders to drill down and identify whether disparities arise at a more granular level and would also enable the collection of better information on the specific types of businesses that are accessing, or struggling to access, credit. For example, a wide variety of businesses, including those providing car washes, footwear and leather goods repair, and nail salons, all fall under the 2-digit sector code 81: Other Services (except Public Administration). With a 2-digit NAICS code, all of these business types would be combined into one analysis, potentially masking different characteristics and different outcomes across these business types.

To address concerns related to the complexity of determining a correct NAICS code, the Bureau proposed a safe harbor to indicate that an incorrect NAICS code entry is not a violation of subpart B if the first two digits of the NAICS code are correct and the financial institution maintains procedures reasonably adapted to correctly identify the subsequent four digits (see proposed § 1002.112(c)(2)). The proposed NAICS-specific safe harbor would have been available to financial institutions in addition to the general bona fide error exemption under proposed § 1002.112(b).

The Bureau sought comment on its proposal to collect 6-digit NAICS codes together with the safe harbor described in proposed § 1002.112(c)(2). The Bureau also sought comment on whether requiring a 3-digit NAICS code with no safe harbor would be a better alternative.

Comments Received

The Bureau received comments from a wide range of lenders, trade associations, community groups, and others regarding the reporting of a 6-digit NAICS code as proposed in § 1002.107(a)(15). Numerous community groups as well as a few lenders supported the Bureau's proposal and urged collection of a 6-digit NAICS code. Several commenters emphasized that 1071 data would adequately achieve a fair lending purpose only if they contain key variables that are used in underwriting and enable meaningful fair lending analysis. Commenters stated that NAICS codes provide critical context to understanding credit underwriting decisions and help ensure that fair lending analysis is focused on similarly situated businesses. A few commenters stated that these data must be reported so that lenders cannot hide behind data not collected as the justification for their lending disparities.

A bank and a bank trade association stated that NAICS code could potentially be helpful in demonstrating a non-discriminatory basis for credit decisions with respect to applicants in different industries. The trade association stated that, at most, the Bureau should only add limited data points pursuant to ECOA section 704B(e)(2)(H) that are considered by the financial institution in the credit underwriting process, citing NAICS code and time in business as examples.

Another trade association said that NAICS codes have the advantage of being independently defined and available for reference. The commenter stated that if a NAICS code is supplied by the applicant and published by the Bureau only in the aggregate, the NAICS code can contribute useful information without unduly burdening lenders.

Some commenters stated that a 2- or 3-digit NAICS code would be too high a level of aggregation to facilitate fair lending analysis. A CDFI lender stated that a 6-digit code will offer the most precise insight into the industries that lenders serve, whereas a 3-digit NAICS code will leave unnecessary ambiguity in the data. The commenter provided the example of a dry cleaner sharing the same 3-digit NAICS code as a mortuary and a parking lot.

Furthermore, a number of community groups and several lenders stated that 6-digit NAICS codes are useful for identifying certain industries' ability to access small business credit and to identify areas of unmet need. For example, one community group asserted that the ability to identify needs and opportunities for small businesses requires the ability to compare lending by sector to the total number of businesses in that sector based on other public data sources.

Moreover, some lenders and community groups said that it is already standard practice for many small business lenders to collect NAICS codes. For example, these commenters noted that lenders already collect NAICS codes for SBA loans, Equal Employment Opportunity Commission certifications, and CDFI loans.

In contrast, many industry commenters, along with several business advocacy groups and other commenters, generally opposed the data points proposed pursuant to ECOA section 704B(e)(2)(H), including NAICS code, as discussed in the section-by-section analysis of § 1002.107(a) above. In addition, the majority of industry commenters to address this issue specifically opposed collection of 6-digit NAICS codes. These commenters expressed concerns about the burden on both lenders and applicants and the complexity of determining the appropriate NAICS code. Concerns raised by commenters included, for example, that collecting NAICS codes would slow the loan application process; most lenders are unfamiliar with NAICS codes or do not currently collect them; lenders would have to change their operating procedures significantly which would create strain on staff and resources; and it would add more costs to the lending process which may be passed on to small business borrowers.

Many industry commenters also voiced concern regarding accuracy and data integrity, explaining that small businesses often do not know their NAICS code or may operate in multiple NAICS sectors. Other challenges cited by commenters included the business changing over time; codes having overlapping definitions; and classifications being prone to human error. For example, two trade associations noted that their members who made Paycheck Protection Program loans reported that many applicants were unfamiliar with NAICS codes. Additionally, some industry commenters expressed concern about verifying applicant-provided data and potential liability if the NAICS code is incorrect. One commenter noted that NAICS code classifications could be subject to change based on SBA rulemaking and thus financial institutions would need to monitor such developments. A credit union trade association stated that the identification of business and credit needs can be accomplished without explicit reference to NAICS codes, such as by leveraging already existing data sources and voluntary surveys of business owners. In addition, the trade association asserted that sector-specific analysis of business credit supply and demand is best left to the SBA, which already collects NAICS information through its lending programs.

Several commenters raised concerns that requiring NAICS codes would add confusion to the lending process. A trade association argued that requiring NAICS codes will create frustration for the small business borrower, including delayed application processing, and additional time and operational burden by banks to ensure the information is gathered and entered. They asserted that while NAICS codes are generally provided with some tax documents, lenders found borrower confusion when making Paycheck Protection Program loans, particularly when certain NAICS codes allowed for a more generous loan amount and certain small businesses were unable to benefit from higher loan amounts for certain sectors due to mismatched NAICS codes. Another commenter stated that applicants may struggle to determine which code to report, especially if the nature of the business changes over time or falls under multiple categories.

A number of industry commenters also expressed concern regarding privacy risks in collecting the 6-digit NAICS code. These commenters highlighted the risk of borrower re-identification, particularly in rural areas and smaller communities. Some commenters stated that NAICS code combined with census tract would make it easy to re-identify a small business. In addition, while a community group supported collection of a 6-digit code, it stated that the public database should provide only 4-digit NAICS codes to address privacy concerns.

In addition, a few commenters asserted that collecting NAICS codes would not advance the purposes of section 1071, arguing that collecting NAICS codes does not provide information that would inform fair lending analysis. For example, one bank stated that NAICS code would be of minimal value to fair lending analytics given the complexity of small business lending, such as the scope and size of the business. Moreover, several banks stated that they do not currently collect NAICS codes and that NAICS codes are not used in underwriting or financial analysis purposes.

A few industry commenters supported collection of a 2-digit NAICS code, stating that this would achieve the intended policy goal without creating unnecessary burdens and heightened costs, as well as protect the privacy of market participants. A trade association for online lenders supported collection of a 4-digit NAICS code, stating it would provide sufficient information while mitigating risk of re-identification and avoiding potential impacts and delays to the borrower during the application process. A joint letter from community and business advocacy groups urged the Bureau to permit the submission of a 3-digit code where the applicant does not provide a 6-digit code. Finally, one commenter suggested that the Bureau coordinate with the U.S. Census Bureau to create a suffix to a business's NAICS code that would identify its minority-owned or women-owned status. The commenter stated that this would create efficiencies across organizations and provide an easier and more neutral method of collecting demographic information on applications. The commenter further noted that this suffix could be easily masked when loans are sent to underwriters to ensure it does not impact their decisions.

Final Rule

For the reasons set forth herein, the Bureau is revising § 1002.107(a)(15) to require that financial institutions collect a 3-digit NAICS code for the applicant. The Bureau is also finalizing proposed comments 107(a)(15)–1, –2, and –5, with minor adjustments for consistency. Final comment 107(a)(15)–1 explains what a NAICS code is, and final comment 107(a)(15)–2 addresses what to report if a financial institution is unable to collect or otherwise determine the applicant's NAICS code. Proposed comments 107(a)(15)–3 and –4, which addressed a financial institution's reliance on information from the applicant and from other sources, have been removed as those issues are now addressed in final comment 107(b)–1. Final comment 107(a)(15)–3 (proposed as comment 107(a)(15)–5) cross-references the safe harbor in final § 1002.111(c)(3) for incorrect 3-digit NAICS code entries. The Bureau has considered commenters' concerns regarding the difficulties in obtaining an accurate NAICS code as well as the importance of NAICS codes for fair lending and community development analysis. The Bureau believes that collecting the 3-digit NAICS code will achieve the right balance between minimizing burden on financial institutions and small business applicants, while also providing valuable data to analyze fair lending patterns and identify industry subsectors with unmet credit needs.

The Bureau believes that NAICS code data will considerably aid in fulfilling both section 1071's fair lending purpose and its business and community development purpose, even if the NAICS code is not necessary for determining whether an applicant is a small business. While it will not provide the same level of detail as a 6-digit code, the 3-digit code will still help ensure that fair lending analysts are comparing applicants with similar profiles, thereby controlling for factors that might provide non-discriminatory explanations for disparities in underwriting and pricing decisions. Moreover, NAICS subsector codes are useful for identifying business and community development needs and opportunities of small businesses, which may differ widely based on industry, even controlling for other factors. For example, 3-digit NAICS codes will help data users identify subsectors where small businesses face challenges accessing credit and understand how small businesses in different industries use credit. Furthermore, the Bureau believes that publication of NAICS codes (subject to potential modification and deletion decisions by the Bureau, as discussed in part VIII below) will help provide for some consistency and compatibility with other public datasets related to small business lending activity, which generally use NAICS codes. This ability to synthesize 1071 data with other datasets may help the public use the data in ways that advance both the business and community development and fair lending purposes of section 1071. The Bureau agrees with commenters' concerns that the 2-digit NAICS code would not provide sufficiently detailed information to aid regulators and the public in monitoring particular industries' access to small business credit.

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The Bureau recognizes that covered financial institutions not currently using NAICS codes will need to gain familiarity with the NAICS code system and refer to NAICS subsector classifications for all relevant applications before reporting 3-digit NAICS codes to the Bureau. To address concerns related to the complexity of determining a correct NAICS code, particularly for covered financial institutions that do not currently use NAICS codes, the Bureau is permitting a financial institution to rely on applicable applicant information or statements when compiling and reporting the NAICS code, as well as permitting a financial institution to rely on a NAICS code obtained through the financial institution's use of business information products, such as company profiles or business credit reports (see final comment 107(b)–1). In other words, a financial institution may rely on oral or written statements from an applicant, other information provided by an applicant such as a tax return, or third-party sources such as business information products. The Bureau believes that being able to rely on NAICS codes obtained from the applicant or third-party sources significantly eases potential difficulties for financial institutions in collecting and reporting a 3-digit NAICS code and mitigates concerns about inadvertently reporting an inaccurate code.

In response to industry concerns regarding the accuracy of the NAICS code and the burden of verifying applicant-provided data, the Bureau emphasizes that financial institutions are permitted to rely on NAICS codes obtained from the applicant or third-party sources, without having to verify that information. Furthermore, the Bureau has expanded the NAICS code safe harbor in final § 1002.112(c)(3), which makes clear that the safe harbor extends to financial institutions that rely on an applicant's representations or on other information regarding the NAICS code. Final § 1002.112(c)(3) also provides a safe harbor for incorrect 3-digit NAICS code entries, where the financial institution identifies the NAICS code itself, provided that it maintains procedures reasonably adapted to correctly identify a 3-digit NAICS code. The Bureau has also removed the term ''appropriate'' from the regulatory text of § 1002.107(a)(15). The Bureau believes the term is unnecessary, particularly in light of the revisions to the NAICS code safe harbor in final § 1002.112(c)(3), and removing it may help avoid potential confusion regarding NAICS codes the financial institution obtains from the applicant or other sources.

Additionally, the Bureau understands that multiple NAICS codes may apply to a single business. While this may be more of a concern with 6-digit codes, if more than one 3-digit code applies to a single business, only one 3-digit NAICS code should be reported.

The Bureau acknowledges community groups' concern that collecting anything less than 6-digit NAICS codes will result in less precise data about industry classification. The Bureau nonetheless believes that its final rule requiring collection and reporting of 3-digit NAICS codes (along with the expanded safe harbor) strikes an appropriate balance in addressing the concerns raised by industry and the importance of NAICS code information in fair lending and community development analysis. The Bureau will monitor the utility of the NAICS code data point and, if warranted, may revisit the required number of digits in the future.

Although the Bureau will address re-identification concerns generally by modifying or deleting data upon publication, the Bureau notes that its shift to 3-digit NAICS codes will decrease the risk of re-identification of small business borrowers and related natural persons in rural areas and smaller communities. See part VIII below for further discussion about the privacy analysis and public disclosure of data.

107(a)(16) Number of Workers

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' In the proposed rule, the Bureau stated that it believed that data providing the number of persons working for a small business applicant would aid in fulfilling the business and community development purpose of section 1071. These data would allow users to better understand the job maintenance and creation that small business credit is associated with and help track that aspect of business and community development.

Proposed § 1002.107(a)(16) would have required financial institutions to report the number of non-owners working for the applicant.

Proposed comment 107(a)(16)–1 would have discussed the collection of the number of workers. The proposed comment would have stated that in collecting the number of workers from an applicant, the financial institution would explain that full-time, part-time, and seasonal workers, as well as contractors who work primarily for the applicant, would be counted as workers, but principal owners of the business would not. The proposed comment would have further stated that if the financial institution was asked, it would explain that volunteers would not be counted as workers. This treatment of part-time, seasonal, contract, and volunteer workers would follow the SBA's method for counting employees,[667] with minor simplifications. The Bureau sought comment on whether further modifications to the number of workers data point were needed to facilitate this operational simplification.

Proposed comment 107(a)(16)–1 would have also explained that workers for affiliates of the applicant would only be counted if the financial institution were also collecting the affiliates' gross annual revenue.

The proposed comment would have further explained that the financial institution could rely on statements of or information provided by the applicant in collecting and reporting number of workers, but if the financial institution verifies the number of workers provided by the applicant, it must report the verified information.

Proposed comment 107(a)(16)–1 would have also provided sample language that a financial institution could use to ask about the number of workers, if it does not collect the number of workers by another method. The Bureau provided the sample language in the proposed comment, which implements the simplified version of the SBA definition referenced above. The Bureau sought comment on this method of collection, and on the specific language proposed.

Proposed comment 107(a)(16)–2 would have first clarified that a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, including the number of workers of the applicant. The proposed comment would have then stated that if a financial institution is nonetheless unable to collect or determine the number of workers of the applicant, the financial institution reports that the number of workers is ''not provided by applicant and otherwise undetermined.''

The Bureau sought comment on its proposed approach to the number of workers data point, as well as on the specific requests for comment above.

[667] *See* 13 CFR 121.106(a).

The Bureau also sought comment on whether financial institutions collect information about the number of workers from applicants using definitions other than the SBA's, and how the collection of this data point could best be integrated with those collections of information.

Comments Received

The Bureau received comments on its proposed number of workers data point from lenders, trade associations, and community groups. A number of commenters supported the Bureau's proposal. A few commenters urged the Bureau to adopt the number of workers data point, suggesting that it is important for business and community development purposes. A CDFI lender and community group commenter said that the number of workers data point will help provide a greater understanding of owner-operated and microbusiness needs and accessibility to affordable credit. Another community group commented that the data point provides insight into the number of jobs created, retained and/or supported by access to credit. This community group further noted that the data point would also assist in analysis of whether businesses of various sizes fare differently in the lending marketplace. Many community groups expressed support for collecting data on the number of workers because they believe it will help indicate whether smaller businesses of various sizes will require more support and technical assistance when it comes to credit access. A minority business advocacy group commented that the data will help determine various levels of economic development and impact across the country. A few commenters agreed with the Bureau's proposed method of collecting the number of non-owner workers and including part-time staff, seasonal staff, and contractors that work primarily for the business.

A trade association commented that the important considerations are that the Bureau provide language for lenders to provide to applicants to help applicants correctly answer the question and that the Bureau emphasize that financial institutions may rely on statements made by the applicant without incurring risk. Another industry commenter suggested that the final rule enable principal owners to count themselves as workers because this method is more common in industry and would avoid confusion. A bank recommended that the final rule expressly permit covered financial institutions to collect required data from applicants through a variety of means, including on the application form, supplemental documents or forms, or the sample data collection form. A CDFI lender suggested that the Bureau require financial institutions to report the breakdown of full-time and part-time workers.

The Bureau received many comments from industry opposing the proposal to collect data on the number of workers. Some commenters stated that data on the number of workers is not currently collected and that some customers do not readily have this information available, though several noted they had collected it for Paycheck Protection Program loans. A trade association stated that the data are unfamiliar to the applicant or difficult to obtain and will result in additional complexity, confusion, and significant operational and regulatory costs. Several commenters indicated that it is not a factor in the credit decision. A bank stated that it is not in the banker's role to determine this information and there is no reason to collect and monitor this data point if the small business is a creditworthy borrower.

A few industry commenters questioned the value of this data point, arguing that it would not aid in fulfilling the fair lending purpose of section 1071. Two asserted that without context (for example, separating full-time versus part-time and contract workers) there seems to be little value in collecting the information. One suggested that collection is further complicated when the gross annual revenue of an affiliate is considered, because then the number of workers for the affiliate must be included. Several industry commenters also stated that the proposed general exclusion of affiliate employees is problematic because some of these employees may perform substantial services for the applicant.

A bank commented that the CRA already considers the impact of adding jobs through small business and community development loans. Another bank commented that SBA uses either the gross annual revenue or number of workers, depending on the type of business, to qualify businesses as small and because the Bureau's proposal already contains a gross annual revenue size test, it would be unnecessary to collect the number of workers because it is irrelevant to the credit decision and determining the size of the business.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(16) with an addition and a minor revision to the associated commentary. Pursuant to its authority under ECOA section 704B(e)(2)(H), the Bureau believes that data on the number of workers will aid in fulfilling the business and community development purpose of section 1071. Data on the number of persons working for a small business applicant will provide data users and relevant stakeholders with a better understanding of the job maintenance and creation that small business credit provides.

In response to comments regarding the complexity and difficulty in collecting information about the number of workers, the Bureau is adding a new comment to require that financial institutions report the number of workers using ranges rather than reporting the specific number of workers. Final comment 107(a)(16)–1 provides that a financial institution complies with § 1002.107(a)(16) by reporting the number of people who work for the applicant using the ranges prescribed in the Filing Instructions Guide. The Bureau believes that reporting the number of workers in ranges rather than a specific numerical value will eliminate some of the collection difficulties expressed by commenters, such as determining the exact number of employees when that number varies throughout the year.

The Bureau is finalizing comment 107(a)(16)–2 (renumbered from comment 107(a)(16)–1 in the proposed rule) with some revisions as well as additional guidance on how a financial institution may collect information about the number of workers in light of final comment 107(a)(16)–1. Specifically, a financial institution may collect the number of workers from an applicant using the ranges specified by the Bureau in the Filing Instructions Guide (as indicated in final comment 107(a)(16)–1) or as a numerical value. Final comment 107(a)(16)–2 retains from proposed comment 107(a)(16)–1 the discussion on collecting the number of workers, including the sample language to provide to applicants to ask about the number of workers and the statement that a financial institution may rely on the applicant's response, but the Bureau is making minor edits for clarity. The Bureau agrees with commenters that these provisions are helpful, and is including them to facilitate compliance.

The Bureau agrees with commenters' recommendations that financial institutions should be able to rely on statements made by the applicant and should be permitted to collect required data from applicants through a variety of means. First, the rule does not limit the means by which the number of workers data can be collected, and though it provides optional language to use, it does not require the use of that language. The Bureau believes that allowing financial institutions to rely on applicant-provided data will sufficiently safeguard accuracy such that the resulting data will aid in fulfilling the purposes of section 1071. The Bureau also believes that reporting the verified number of workers when the financial institution already possesses that information will not be operationally difficult, and will enhance the accuracy of the information collected. To facilitate compliance with the regulation, the Bureau provides guidance related to reliance on all applicant-provided data, including number of workers, in final comment 107(b)–1. Generally, that comment permits reliance on statements of the applicant or information provided by an applicant; however, if a financial institution verifies information, it reports the verified data. For more information on relying on statements made by or provided by an applicant, see the section-by-section analysis of § 1002.107(b).

The Bureau is finalizing comment 107(a)(16)–3 (renumbered from proposed comment 107(a)(16)–2) with a minor edit for clarity. Final comment 107(a)(16)–3 cites to § 1002.107(c), which provides that a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the number of workers of the applicant. Comment 107(a)(16)–3 further explains that a financial institution reports that the number of workers is "not provided by applicant and otherwise undetermined" if, despite such procedures, the financial institution is unable to collect or determine the information. The Bureau believes that allowing this response will facilitate compliance when an applicant does not provide the requested data.

The final rule does not require financial institutions to report the distinction between various worker categories such as full time versus part time, as recommended by some commenters. The Bureau believes that requiring distinctions between various worker categories could introduce unnecessary complexity and compliance challenges. The final rule also does not include principal owners in the number of workers, as recommended by a commenter. The final rule requires the separate collection of the number of principal owners in final § 1002.107(a)(20), and the Bureau believes that this differentiation will improve the granularity and usefulness of the data collected.

The Bureau acknowledges comments noting that some financial institutions do not collect or maintain data on number of workers nor is the information used in their credit decisions. However, the Bureau believes that number of workers is critical to further the business and community development purpose of section 1071 and the Bureau does not believe it will be particularly difficult for financial institutions to obtain this information if they do not do so already. The Bureau has also provided sample language in final comment 107(a)(16)–2 that a financial institution may use to ask an applicant about the number of workers.

With respect to questions from commenters about how the number of workers data point meets section 1071's purposes, as discussed above the Bureau believes the data will provide insight into small business credit that contributes to job creation and maintenance, as well as other trends in the small business market's ability to grow and maintain workers, and the full set of data required to be collected and reported under this final rule should provide sufficient context for meaningful understanding of this data point. Regarding the comment that the CRA already considers the impact of adding jobs through small business and community development loans, the Bureau notes that data collected under section 1071 vary from data collected under CRA and the institutions subject to section 1071 are not necessarily subject to CRA. Regarding the concerns raised by commenters that the number of workers for an applicant's affiliates must be counted if the affiliates' gross annual revenues are considered, the Bureau notes that the applicant is already providing information on affiliate(s) in this situation, and the financial institution can simply ask a question regarding number of workers, perhaps using the language provided in final comment 107(a)(16)–2, and tell the applicant to include affiliate information.

107(a)(17) Time in Business

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." In the proposed rule, the Bureau stated that it believed that data providing the time in business of a small business applicant would aid in fulfilling both the business and community development and fair lending purposes of section 1071.

The Bureau proposed § 1002.107(a)(17) to require a financial institution to collect and report the time the applicant has been in business, described in whole years, as relied on or collected by the financial institution. Proposed § 1002.107(a)(17) would have required the data be reported in whole years, rather than ranges of time, because a financial institution would have a definite number of years if it collects this information presently, and the Bureau believed that time in business reported in whole years would make the data more granular and useful.

Proposed comment 107(a)(17)–1 would have provided guidance on how to report one of the two methods (relied on or collected) for reporting the time-in-business data point. The proposed comment would have explained that, regardless of which method is used, the financial institution must report the time in business in whole years, or indicate if a business has not begun operating yet, or has been in operation for less than a year. Proposed comment 107(a)(17)–1 would have explained that when the financial institution relies on an applicant's time in business as part of a credit decision, it reports the time in business relied on in making the credit decision. However, the comment would have further explained that proposed § 1002.107(a)(17) would not require the financial institution to rely on an applicant's time in business in making a credit decision.

Proposed comment 107(a)(17)–1 would have also explained that the financial institution may rely on statements or information provided by the applicant in collecting and reporting time in business; however, pursuant to proposed § 1002.107(b), if the financial institution verifies the time in business provided by the applicant, it must report the verified information. This guidance would have applied whether the financial institution relies on the time in business in making its credit decision or not, although the Bureau believed that verification would be very uncommon when the financial institution is not relying on the information.

Proposed comment 107(a)(17)–2 would have provided instructions on how to report the time in business relied on in making the credit decision. The proposed comment would have stated that when a financial institution evaluates an applicant's time in business as part of a credit decision, it reports the time in business relied on in making the credit decision. For

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example, the proposed comment would have further explained, if the financial institution relies on the number of years of experience the applicant's owners have in the current line of business, the financial institution reports that number of years as the time in business. Similarly, if the financial institution relies on the number of years that the applicant has existed, the financial institution reports the number of years that the applicant has existed as the time in business. Proposed comment 107(a)(17)–2 would have then concluded by stating that a financial institution reports the length of business existence or experience duration that it relies on in making its credit decision, and is not required to adopt any particular definition of time in business.

Proposed comment 107(a)(17)–3 would have stated that a financial institution relies on an applicant's time in business in making a credit decision if the time in business was a factor in the credit decision, even if it was not a dispositive factor. The proposed comment would have provided the example that if the time in business is one of multiple factors in the financial institution's credit decision, the financial institution has relied on the time in business even if the financial institution denies the application because one or more underwriting requirements other than the time in business are not satisfied.

Proposed comment 107(a)(17)–4 would have clarified that if the financial institution does not rely on time in business in considering an application, pursuant to proposed § 1002.107(c)(1) it shall still maintain procedures reasonably designed to collect applicant-provided information, which includes the applicant's time in business. The proposed comment would have explained that in collecting time in business from an applicant, the financial institution complies with proposed § 1002.107(a)(17) by asking for the number of years that the applicant has been operating the business it operates now. The proposed comment would have further explained that when the applicant has multiple owners with different numbers of years operating that business, the financial institution collects and reports the greatest number of years of any owner. Proposed comment 107(a)(17)–4 would have then concluded by making clear that the financial institution does not need to comply with the instruction if it collects and relies on the time in business by another method in making the credit decision.

Proposed comment 107(a)(17)–5 would have explained that pursuant to proposed § 1002.107(c)(1) a financial institution shall maintain reasonable procedures to collect information provided by the applicant, which includes the time in business of the applicant, but if the financial institution is unable to collect or determine the time in business of the applicant, the financial institution reports that the time in business is "not provided by applicant and otherwise undetermined."

The Bureau sought comment on its proposed approach to this data point. The Bureau also sought comment on whether time-in-business information may be less relevant or collectable for certain products or situations (such as retailer-branded credit cards acquired at point of sale) and whether reporting "not applicable" should be allowed in those instances. In addition, the Bureau sought comment on whether there should be an upper limit on time in business—for example, to allow reporting of "over 20 years" for any applicant of that duration, rather than requiring reporting of a specific number of years.

Comments Received

The Bureau received comments on its proposed time in business data point from a number of lenders, trade associations, and community groups. A number of commenters supported the Bureau's proposal to collect time in business data with some pointing out the importance of time in business for the fair lending and community development purposes of section 1071. A trade association noted that time in business data are potentially useful for lenders, policymakers, regulators, and communities and that this is a common credit consideration for the type of small business lending undertaken by certain financial institutions. This trade association asserted that the data can help explain differences in underwriting risk among small business applicants and avoid misinterpretation of the dataset by distinguishing potentially riskier new businesses from established businesses. A community group stated that this data point is needed to assess if access to credit is reasonably available and whether there are geographical barriers that do not seem present in other areas based on analysis of the data. This commenter further stated that such analysis can help stakeholders identify and ameliorate any access to credit barriers for younger firms.

A bank and a trade association commented that this data point could be helpful in demonstrating a non-discriminatory basis for different credit decisions and may provide helpful context for evaluating the basis for credit decisions and conducting an accurate, fact-based fair lending analysis. A community group stated that lenders already collect or consider the number of years a small business has been in operation as it is an element of loan risk and underwriting. This commenter further stated that time-in-business data would allow the assessment of whether businesses of similar duration are likely to receive credit at comparable terms, such as by comparing Black-owned, Latino-owned, and Asian-owned start-ups with white-owned start-ups. A number of commenters noted in discussing data points, including time in business, that fair lending analysis requires a robust set of key variables that are used in underwriting. Relatedly, other commenters stated that data collected under the Bureau's rule must be sufficient to allow data users to understand the characteristics of applicants that are denied credit so as to identify areas of unmet need and also to be able to compare declined applicants with those who are approved for credit to look for evidence of discrimination.

Commenters specifically pointed out the importance of collecting information regarding whether a business is a start-up. A community group noted start-ups and younger businesses generally have more difficulties qualifying for credit, and other commenters pointed out that it is well known that start-ups often struggle to access financing.

In contrast, the Bureau received many comments from lenders and trade associations generally opposing the Bureau's proposal to collect time in business. One trade association questioned how asking how long a company has been in operation furthers fair lending purposes. A few banks stated that the information is not considered for underwriting purposes or relevant to the creditworthiness of the applicant. An agricultural lender asserted that time in business data can be unknown, misleading, or not relevant. A few industry commenters asserted that time in business data are not currently collected or maintained by lenders. Some commenters said collecting time in business data would impose compliance burden and one also said that it would add friction to the application process. A bank stated that customers do not have this type of information readily available when applying for a commercial loan. Another bank noted that the data point adds a layer of complexity, will not provide useful information that advances section 1071, and goes beyond what other laws, such as HMDA, require financial institutions to collect. A trade association commented that time in business is unfamiliar to the applicant or difficult to obtain and will result in additional complexity, confusion, and significant operational and regulatory costs. Another trade association said this data point involves complexities because many small businesses cannot provide an exact amount of time in business due to name changes, mergers and acquisitions, and other routine events that complicate this calculation. A bank stated that its borrowers rarely keep good enough records to properly state the date they began doing business. An agricultural lender stated that time in business can be difficult to determine for a farming operation that may have begun as a lifestyle venture or arose from multiple generations of farming.

Some commenters expressed concerns with the data to be collected as well as the method of reporting. A bank stated that it makes loans for startup companies and relies on the applicant's experience in the given industry rather than the length of time they have operated their current business; however, underwriting for an established business uses the length of time that specific business has been in operation. Although the Bureau's proposal allows for the consideration of business experience or business longevity, this commenter and several others asserted that the resulting data gathered will not be comparable and analysis of that data will be meaningless. Another bank stated that in most cases, the credit decision is a combination of the number of years the applicant has been in business and the number of years the principals have been in the industry, but if one institution reports the number of years the applicant has been in business and another reports the number of years of experience of the principals, they would not appear to be as similarly situated as they are; therefore, it will be impossible to make comparisons or draw accurate conclusions with respect to the information submitted. Another bank pointed out this same issue and stated that the mixture of responses would lead to unreliable information, unjustifiable conclusions, and unjustified burden on applicants and financial institutions. Other banks and a trade association also indicated that the credit decision can be based on a combination of the number of years the applicant has been in business and the number of years the principals have been in the industry. Two of these commenters also said that the Bureau did not provide guidance on how to report the data in these circumstances.

A bank trade association commented that many small business borrowers create new entities for various reasons and expressed concern that the data collected could suggest lenders are giving more favorable treatment to new small businesses as opposed to existing ones. Another trade association stated that collecting time in business using management or owner experience rather than the age of the business itself undercuts the Bureau's rationale that time in business could explain the difference in underwriting risk among small business applicants and avoid misinterpretation of data. This commenter recommended that time in business be collected at the financial institution's option. A bank was concerned that time in business data may make it appear to discriminate against start-up businesses, explaining that its practice has been to avoid providing financing for start-up businesses unless it can secure government guaranties because in distressed areas where the bank generally lends, start-up businesses have historically been unable to sustain a repayment history for the loan term due to business closure and liquidation. Therefore, the bank explained, if comparing this information for fair lending, it will appear that they are discriminating against start-up businesses when there are studies showing that minority-owned businesses are under-financed as start-ups.

Several commenters requested the Bureau provide clarification on certain aspects of reporting the data point or made recommendations for reporting the data. A bank suggested that the Bureau collect the time the business has been active regardless of ownership experience or time the current owners have owned this business. A community group recommended that financial institutions be required to report the time in business used when underwriting the loan because time in business could refer to either the time period since the business was formally incorporated or the time period of operation. A bank requested clarification on temporary lapses in business and how to report seasonal businesses. Several agricultural lenders and a trade association suggested that if this data point is not dropped then the Bureau should tie it to the established Farm Credit data point, "Year began Farming," because Farm Credit associations already collect "Year began farming." These commenters reasoned that there would be needless confusion in the context of agricultural credit if there were separate and competing definitions of "Time in business" and "Year began farming." A bank recommended that the easiest way to report time in business information is with a number in the column; however, it suggested that for newer businesses, particularly for those with less than one year in business, the number should be reported in ranges, *e.g.,* 0–6 months or 7–12 months. A community group said that credit card lenders should not be able to routinely report "not applicable" for this data point because the information should not be too hard to ask for on an application form. A bank and a trade association requested that the Bureau allow all financial institutions to report the applicant's time in business, whether used in credit underwriting or collected from the applicant, and to rely on the information provided by the applicant. These commenters also requested that the Bureau include in the final rule a safe harbor from liability for reporting the applicant-provided time in business. Another trade association also recommended that the Bureau clarify that financial institutions may rely on statements made by the applicant without incurring risk.

A bank commented that putting an upper limit on years to report is not a good idea and said that time in business should always be reported as a specific number of years. The bank reasoned that there are businesses that struggle at the 5 year mark, the 10 year mark, or the 50 year mark. According to this bank, one should not assume that applicants are "fine" because those years are above an arbitrary number the Bureau has chosen.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(17) with revisions to the regulatory text and commentary. As explained below, financial institutions will be required to report the time the applicant has been in business, but the Bureau has revised the requirements to provide financial institutions more flexibility in collecting the information. Pursuant to its authority under ECOA section 704B(e)(2)(H), the Bureau determines that collecting data on time in business will further the purposes of section 1071, as further explained below.

The Bureau believes that time in business will advance both statutory purposes of section 1071. Research illustrates the role that start-ups and new businesses play in the business ecosystem and in promoting important community development aims, such as creating new jobs.[668] Financial institutions often have special credit policies regarding start-ups and other young businesses, including whether the institution will extend credit to start-ups at all, the type(s) of credit products start-ups and new businesses can apply for, and the amount of credit for which they can be approved. Studies generally show that start-ups experience greater difficulty in accessing credit.[669]

Time in business data will benefit data users, including financial institutions, policymakers, economic analysts, and communities by allowing them to better identify the proportion of small businesses seeking credit that are start-ups or relatively new businesses, the type(s) of credit offered to these groups, the geographic setting of these businesses, the types of financial institutions that are reaching such businesses, and where communities might focus business development efforts. The data may also aid policymakers in addressing issues impacting the growth of small start-ups. The data, particularly as to unmet demand, could help interested financial institutions identify lending opportunities to reach more start-ups and new businesses, promoting both business and community development. This data point will also facilitate fair lending analyses by providing a useful control to identify similarly situated applicants and eliminate some false positives, while also allowing monitoring of potential disparate treatment of relatively new minority- and women-owned small businesses.

The Bureau understands from commenters that there are complexities associated with collecting time in business information from an applicant for various reasons, including applicant difficulty providing an exact time because of prior name changes, events that affected the applicant's structure, multi-generational ownership, and others discussed by commenters above.

In light of the feedback received, the Bureau has revised the requirements for reporting time in business information, based on the financial institution's procedures. The Bureau is also not finalizing this data point to include data as relied on by the financial institution to make a decision. Rather, the final rule requires financial institutions to report time in business as collected or otherwise obtained. Although this requirement is similar to reporting the time in business relied on, the new language makes clear that the financial institution reports the time in business collected or obtained regardless of whether it relied on that information in underwriting the application. Commenters indicated that they may base their credit decision on a combination of factors, such as the time the applicant has been in existence and the time the owners have been in the industry, while other commenters indicated that they do not collect or use time in business for underwriting purposes. The Bureau believes that standardizing the time in business data point to be based on what the financial institution collects or obtains streamlines the requirement and provides flexibility for the financial institution to report time in business information based on its credit policies or programs rather than having to select a time in business method specifically for reporting pursuant to this rule. Accordingly, the Bureau is not finalizing "as relied on or collected by the financial institution" in the regulatory text. Final regulatory text for § 1002.107(a)(17) requires reporting of the time the applicant has been in business; however, the Bureau is providing further details guidance in commentary regarding time in business collection and reporting, as explained below. As some commenters suggested, allowing different methods for measuring time in business will have an effect on the comparability of the data, but information about the time in business actually collected by the financial institution for its own purposes will be useful for fair lending analysis and will impose less operational difficulty than requiring reporting based on a single definition. For example, this method will allow a financial institution to use the "year began farming" date, as suggested by some commenters, to report time in business without further inquiry.

Final comment 107(a)(17)–1.i provides that a financial institution reports time in business in whole years if, as part of its procedures, it collects or obtains the number of years an applicant has been in business. Final comment 107(a)(17)–1.i also provides guidance to make clear that if the financial institution reports the number of whole years, the financial institution rounds down to the nearest whole year. Final comment 107(a)(17)–1.ii provides that if a financial institution does not collect or obtain the number of years an applicant has been in business, but as part of its procedures it determines whether or not the applicant has been in business less than two years, then the financial institution reports the applicant's time in business as either less than two years or two or more years. Final comment 107(a)(17)–1.iii provides that if a financial institution does not collect or obtain time in business, either as number of years or a determination as to whether the applicant has been in business less than two years, then the financial institution complies with the rule by asking the applicant whether it has been in business less than two years or two or more years. The Bureau is not finalizing the provision in proposed comment 107(a)(17)–1.ii to require financial institutions to indicate whether an applicant has not begun operating yet or has been in operation less than a year. In addition, the Bureau is not requiring that newer business applicants' time in business be reported in ranges, as one commenter suggested. The Bureau believes that time in business information reported in whole years or an indication of over or under two years can provide data users with robust information regarding start-ups and newer businesses as well as the maturity of other businesses, thus furthering the purposes of section 1071 while also simplifying collection and reporting. Issues such as whether to report the time in business based on the time of incorporation or time of business opening, lapses in business operation such as for a seasonal business, and new business entities that do not actually constitute a new enterprise should all be considered within the financial institution's discretion in collecting time in business. The Bureau does not believe that these scenarios will have a significant effect on the quality of the data reported, but crafting a rule that takes them into account could considerably increase the operational difficulty of compliance.

Final comment 107(a)(17)–2 provides that a financial institution that collects time in business as part of its procedures is not required to collect or obtain time in business information pursuant to a specific definition for the purposes of this rule. The comment

[668] *See, e.g.*, Small Bus. Admin., *2018 Small Business Profiles*, at 1–2 (2018), *https://www.sba.gov/advocacy/2018-small-business-profiles-states-and-territories?utm_medium=email&utm_source=govdelivery*; John Haltiwanger *et al.*, *Who Creates Jobs? Small versus Large versus Young*, 95(2) Review of Econ. & Stat., at 347–61 (2013), *https://direct.mit.edu/rest/article/95/2/347/58100/Who-Creates-Jobs-Small-versus-Large-versus-Young*.

[669] For example, a Federal Reserve Bank of New York report, based on data from the 2016 Small Business Credit Surveys that included information from 12 Federal Reserve Banks, provides statistics on how start-ups are less likely to receive credit as compared to mature businesses, even with comparable credit scores. *See* Fed. Rsrv. Bank of N.Y., *Small Business Credit Survey: Report on Start-up Firms*, at iv (2017), *https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-StartupFirms-2016.pdf*.

provides examples of how a financial institution may define time in business, including by asking the applicant when the business started or based on the owner's experience in the industry. As discussed above, the Bureau understands from commenters that a financial institution may collect and/or consider for underwriting both the number of years the applicant has been in business and the number of years of experience an owner has in the industry. In response to a comment requesting clarification and to mitigate other commenter concerns, final comment 107(a)(17)–2 provides that if a financial institution collects the number of years the applicant has existed as well as another measure of time in business, such as the number of years of experience an owner has in the industry, the financial institution reports the number of years the applicant has existed as the time in business. The Bureau believes that this method will result in more uniform and comparable data on time in business and should not cause operational difficulty because the financial institution will be reporting information that it already collects.

Comment 107(a)(17)–3 (renumbered from proposed comment 107(a)(17)–6) is finalized with minor clarifications. Final comment 107(a)(17)–3 provides that a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes time in business; however, if the financial institution is nonetheless unable to collect this information, then the financial institution reports ''not provided by applicant and otherwise undetermined'' for the time in business data point. The Bureau believes that providing this reporting option will facilitate compliance.

The Bureau acknowledges commenters' arguments that time in business is not collected by some financial institutions now nor used by such institutions for underwriting purposes. However, other industry commenters indicated that they do collect and use time in business for underwriting (for example, commenters stated the credit decision is based on a combination of the number of years the applicant has been in business and the number of years the principals or owners have in the industry).

Commenters also expressed concern with the burden associated with collecting time in business information. The Bureau does not believe it would be too difficult for financial institutions to collect this information if they do not already do so, and the ability to merely ask whether a business has existed for less than two years or two years or more should reduce any complexity for applicants in providing the information. The Bureau also believes that collection of time in business will further the dual purposes of section 1071, as discussed above. The final rule does not permit time in business information be reported at the financial institution's option, as the Bureau believes that if it made this data point optional, very little data would be reported.

With respect to the concern raised by a commenter that reporting time in business information may cause a financial institution to appear to discriminate against start-up businesses because of its policy to avoid providing financing to start-ups, the Bureau believes that time in business information will help mitigate concerns of data misrepresentation and help explain the credit decision made by a financial institution. For example, data indicating that an applicant is relatively new with little experience or financial history could explain why the financial institution denied the application or approved it for less than what was applied for.

With respect to the recommendation that the Bureau allow all financial institutions to report the applicant's time in business whether used in credit underwriting or collected from the applicant, the final rule provides this flexibility for financial institutions. The final rule also allows the financial institution to collect applicant-provided data, including time in business information, from appropriate third-party sources. See final § 1002.107(b).

The Bureau is not adopting a safe harbor from liability for reporting the applicant-provided time in business for the reasons provided in the section-by-section analysis of § 1002.112(c). Guidance related to relying on information provided by an applicant and appropriate third-party sources, including time in business information, is provided in final comment 107(b)–1. (Similar content was included in proposed comment 107(a)(17)–1.) That comment explains that a financial institution needs report verified information only if it verifies information from the applicant for its own business purposes. Because the rule makes clear that a financial institution may rely on statements made by or information from the applicant regarding time in business and need not verify its accuracy, the Bureau does not believe that a safe harbor is necessary. For more information on relying on information provided by an applicant, see the section-by-section analysis of § 1002.107(b).

107(a)(18) Minority-Owned, Women-Owned, and LGBTQI+-Owned Business Statuses Background

ECOA section 704B(b) requires financial institutions to inquire whether applicants for credit are minority-owned and/or women-owned businesses and to maintain a record of the responses to that inquiry separate from the applications and accompanying information. Section 704B(c) provides that applicants for credit may refuse to provide information requested pursuant to 704B(b). ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' The Bureau is finalizing § 1002.107(a)(18) to address how a financial institution would collect and report an applicant's minority-owned and women-owned business statuses, along with LGBTQI+-owned business status which the Bureau believes would aid in fulfilling the purposes of section 1071.

The Bureau proposed appendix F to provide instructions to aid financial institutions when collecting minority-owned business status pursuant to proposed § 1002.107(a)(18) and women-owned business status pursuant to proposed § 1002.107(a)(19). However, there was some duplication between what was contained in proposed appendix F and in proposed § 1002.107(a)(18) and (19) and associated commentary.

As discussed further herein, final § 1002.107(a)(18) differs from proposed § 1002.107(a)(18) in a number of ways, largely to streamline the rule and facilitate compliance. First, the final rule combines proposed § 1002.107(a)(18) and (19) into final § 1002.107(a)(18). Next, final § 1002.107(a)(18) also requires collection of LGBTQI+-owned business status. Finally, the commentary to final § 1002.107(a)(18) incorporates the information contained in proposed appendix F.

Proposed Rule—Proposed § 1002.107(a)(18) and (19)

In order to implement the section 1071 requirement that financial institutions inquire whether applicants for credit are minority-owned and/or women-owned businesses, the Bureau proposed § 1002.107(a)(18) to address minority-owned business status, and § 1002.107(a)(19) to address women-owned business status. The text of these proposed provisions was otherwise identical in their language. Proposed § 1002.107(a)(18) and (19) would have required financial institutions to collect and report whether an applicant is a minority-owned or women-owned business, respectively. Proposed § 1002.107(a)(18) and (19) would also have required financial institutions to collect and report whether minority-owned business status or women-owned business status, respectively, was being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). When the financial institution requests minority-owned and women-owned business statuses from an applicant, the financial institution would have been required to inform the applicant that the financial institution cannot discriminate on the basis of the applicant's minority-owned or women-owned business status, or on whether the applicant provides this information. Finally, proposed § 1002.107(a)(18) and (19) would have referred to proposed appendix F for additional details regarding how financial institutions are required to collect and report minority-owned or women-owned business statuses, respectively. Proposed appendix F would have included a requirement that a financial institution inform an applicant that the applicant is not required to respond to the financial institution's questions regarding the applicant's minority-owned business status and women-owned business status and inform the applicant of a prohibition on financial institutions requiring applicants to provide this information.[670]

Proposed comments 107(a)(18)–1 and 107(a)(19)–1 would have clarified that a financial institution would be required to ask an applicant if it is a minority-owned business or women-owned business, respectively, for each covered application unless the financial institution is permitted to report minority-owned business status or women-owned business status, respectively, based on previously collected data. Additionally, the financial institution would have been required to permit an applicant to refuse to answer the financial institution's inquiry and to inform the applicant that it is not required to provide the information. The financial institution would have reported the applicant's response, its refusal to answer the inquiry (such as when the applicant indicates that it does not wish to provide the requested information), or its failure to respond (such as when the applicant fails to submit a data collection form) to the inquiry.

Proposed comments 107(a)(18)–2 and 107(a)(19)–2 would have explained that a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of an applicant's minority-owned business status or women-owned business status, respectively, or on whether the applicant provides the information. These proposed comments would also have clarified that a financial institution may combine this non-discrimination notice regarding minority-owned business status or women-owned business status, respectively, with the similar non-discrimination notices that a financial institution is required to provide when requesting women-owned business status or minority-owned business status, respectively, and a principal owner's ethnicity, race, and sex if a financial institution requests such information in the same data collection form or at the same time.

Proposed comments 107(a)(18)–3 and 107(a)(19)–3 would have explained how, pursuant to proposed § 1002.111(b), financial institutions must record an applicant's response regarding minority-owned business status and women-owned business status pursuant to proposed § 1002.107(a)(18) or (19), respectively, separate from the application and accompanying information. These proposed comments would have also provided examples of how responses could be recorded separately from the application and accompanying information.

Proposed comments 107(a)(18)–4 and 107(a)(19)–4 would have stated that pursuant to proposed § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, which includes the applicant's minority-owned business status or women-owned business status, respectively. However, if a financial institution did not receive a response to its inquiry, the financial institution would have reported that the applicant's minority-owned business status or women-owned business status, respectively, is "not provided by applicant."

Proposed comments 107(a)(18)–5 and 107(a)(19)–5 would have stated that notwithstanding proposed § 1002.107(b) (regarding verification of applicant-provided information), a financial institution would have reported the applicant's response, its refusal to answer the inquiry, or its failure to respond to the inquiry pursuant to proposed § 1002.107(a)(18) or (19), respectively, even if the financial institution verifies or otherwise obtains an applicant's minority-owned business status or women-owned business status for other purposes. Moreover, a financial institution would not have been required or permitted to verify the applicant's responses to the financial institution's inquiries pursuant to proposed § 1002.107(a)(18) or (19) regarding minority-owned business status or women-owned business status, respectively.

Proposed comments 107(a)(18)–6 and 107(a)(19)–6 would have clarified that a financial institution does not report minority-owned business status or women-owned business status, respectively, based on visual observation, surname, or any basis other than the applicant's response to the inquiry that the financial institution makes to satisfy proposed § 1002.107(a)(18) or (19), respectively, or, if the financial institution was permitted to report based on previously collected data, on the basis of the applicant's response to the inquiry that the financial institution previously made to satisfy § 1002.107(a)(18) or (19), respectively.

Proposed comments 107(a)(18)–7 and 107(a)(19)–7 would have clarified that a financial institution may report minority-owned business status or women-owned business status, respectively, based on previously collected data if the financial institution is permitted to do so pursuant to proposed § 1002.107(c)(2) and its commentary.

The Bureau sought comment on its proposed approach to these data points, including the proposed methods of collecting and reporting the data. The Bureau also requested comment on whether additional clarification regarding any aspect of these data points is needed. In particular, the Bureau sought comment on whether applicants are likely to have difficulty understanding and determining the information they are being asked to provide and, if so, how the Bureau may mitigate such difficulties.

Proposed Rule—Proposed Appendix F

Proposed appendix F would have provided instructions to aid financial institutions when collecting minority-owned business status pursuant to proposed § 1002.107(a)(18) and women-owned business status pursuant to proposed § 1002.107(a)(19).

The Bureau proposed appendix F pursuant to its authority under ECOA

[670] Proposed appendix G would have included a similar requirement to notify applicants that they are not required to provide information regarding principal owners' ethnicity, race, and sex and of a similar prohibition on financial institutions requiring that applicants provide such information.

section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071, in order to facilitate compliance with the statutory requirements to collect minority-owned and women-owned business statuses pursuant to 704B(b)(1). Further, the Bureau proposed appendix F pursuant to its obligation in 704B(g)(3) to issue guidance to facilitate compliance with the requirements of section 1071, including assisting financial institutions in working with applicants to determine whether the applicants are women-owned or minority-owned businesses.

The Bureau sought comment on the proposed instructions, and generally sought comment on whether additional clarification regarding any aspect of the proposed instructions was needed. The Bureau further requested comment on whether additional or different instructions were needed for financial institutions that choose not to use a paper data collection form to collect minority-owned business status or women-owned business status, such as collecting such information using a web-based or other electronic data collection form, or over the telephone. The Bureau also sought comment regarding the challenges faced by both applicants and financial institutions by the data collection instructions prescribed in appendix F and specifically requested comment on ways to improve the data collection of minority-owned business status and women-owned business status.

Comments Received—Women-Owned and Minority-Owned Business Statuses

The Bureau received comments on proposed § 1002.107(a)(18) and (19) and appendix F from some industry and community group commenters. Commenters uniformly supported the Bureau's proposal that the financial institution would rely solely on the applicant to determine minority-owned and women-owned business statuses, and that institutions should not be required or permitted to verify an applicant's response. One commenter requested that a financial institution not be required to conduct any follow-up if an applicant fails to provide the information. Another noted that owners and ownership status may change from day to day. One said that the back-office functions of financial institutions will need to ensure the data are being reported correctly and identify any issues in the data, which will require an increase in staff.

A commenter asserted that applicants should be permitted to self-report whether they have been certified by a third-party organization as a minority- and/or women-owned business and the name of the certifying organization, which it said would promote the objectives of section 1071 by encouraging responses of relevant and verifiable information. Another commenter suggested that the Bureau coordinate with the U.S. Census to create a minority and women-owned business suffix to a business's NAICS code which identifies their minority or women-owned business status.

Regarding appendix F, some commenters supported the proposed approach to collecting information. Several commenters requested that the Bureau eliminate duplication and include all mandatory statements in the rule text, rather than in the appendices.

Comments Received—LGBTQI+-Owned Business Status

As discussed in the section-by-section analysis of § 1002.102(k) and (*l*) above, regarding the definitions for LGBTQI+ individual and LGBTQI+-owned business, the Bureau sought comment on whether it should adopt a data point to collect an applicant's lesbian, gay, bisexual, transgender, or queer (LGBTQ+)-owned business status, similar to the way it proposed to collect minority-owned business status and women-owned business status.

The Bureau received comments from several banks, individual commenters, and community groups on this issue. Some commenters did not support including such a data point in the final rule, generally stating that asking for such information would be offensive, would be considered an invasion of privacy, or would damage bank-customer relationships. One commenter said that applicants are unlikely to provide this information and that an applicant's LGBTQ+-owned business status is not considered in the lending process and thus should not be part of this data collection.

A few commenters also stated that asking for such information could potentially further segregate and stigmatize LGBTQ individuals and their businesses, when they already face bias and discrimination. These commenters also raised concerns about the privacy and security of the collected information, noting that storing it with financial institutions and in a nationwide database exposes the information to not only authorized persons but also potentially to hackers. These commenters argued that although there is some protection in the Federal employment law context due to the U.S. Supreme Court's opinion in *Bostock* v. *Clayton County,*[671] there are States where discrimination against LGBTQ individuals is legal and thus inferences about one's sexuality could have serious negative impacts. They also expressed concern that this information could be used for unintended purposes. One commenter also expressed a concern that previously collected information about an applicant's LGBTQ+-owned business status could be used inappropriately.

Other commenters supported inclusion of LGBTQ+-owned business status in the final rule, generally asserting the collection of information about a business' LGBTQ+-owned status is appropriate and necessary under the law. One commenter stated that businesses owned by LGBTQ+ individuals face discrimination and bias and urged the Bureau to use its ECOA section 704B(e)(2)(H) authority to require the collection of such information. Another commenter argued that data about lending availability to LGBTQ-owned businesses will enhance the Bureau's ability to enforce fair lending laws to protect them from discrimination in credit, and identify their credit needs. Another commenter stated that collecting applicants' LGBTQ+-owned business status is necessary to ensure that LGBTQ+ small business owners are being treated fairly by lenders and fulfill the purposes of section 1071. One commenter suggested that the Bureau include an inquiry to identify businesses who have experienced impermissible sex discrimination under ECOA without requiring information on the owners' specifically held identities if they do not wish to disclose them. This commenter suggested this would be consistent with the Bureau's proposal regarding the collection of ethnicity and race.

A commenter also stated that there is public and congressional support for the collection of LGBTQ+-owned business status information, noting that H.R. 1443, the LGBTQ Business Equal Credit Enforcement and Investment Act, would have amended ECOA to include a definition for ''LGBTQ-owned business'' and require the collection of LGBTQ-owned business status.[672]

Commenters suggested that the Bureau adopt the same approach it proposed using for collecting minority-owned and women-owned business statuses, by providing applicants with a definition for LGBTQ-owned business

[671] 140 S. Ct. 1731 (2020). See the section-by-section analysis of § 1002.107(a)(19), under *Proposed Rule—Collecting Sex,* for a discussion of the Court's holdings in *Bostock.*

[672] H.R. 1443, 117th Cong. (2021).

status and allowing respondents to indicate whether they are or are not such a business. Another commenter recommended that financial institutions not be allowed to collect or report such information on the basis of visual observation, surname analysis, or any method other than applicant-provided responses. This commenter also stated that financial institutions should not be permitted or required to verify an applicant's LGBTQ+-owned business status.

Final Rule—Business Status in General

For the reasons set forth herein, the Bureau is adopting § 1002.107(a)(18) with a number of changes to require collection of minority-owned business status, to incorporate collection women-owned business status (from proposed § 1002.107(a)(19)) and to add LGBTQI+-owned business status, along with a number of conforming changes to the commentary. The Bureau has also incorporated information from proposed appendix F into the commentary to final § 1002.107(a)(18),[673] added additional commentary for parity with final § 1002.107(a)(19) regarding collection of principal owners' ethnicity, race, and sex, and updated a number of cross-references.

Final § 1002.107(a)(18) requires the collection of information regarding whether the applicant is a minority-owned, women-owned, and/or LGBTQI+-owned business. When requesting minority-owned, women-owned, and LGBTQI+-owned business statuses from an applicant, § 1002.107(a)(18) requires that a financial institution inform the applicant that the financial institution cannot discriminate on the basis of minority-owned, women-owned, or LGBTQI+-owned business statuses, or on whether the applicant provides this information.

Final comment 107(a)(18)–1 clarifies that a financial institution must ask an applicant whether it is a minority-owned, women-owned, and/or LGBTQI+-owned business. A financial institution must permit an applicant to refuse (*i.e.,* decline) to answer the inquiries and must inform the applicant that it is not required to provide the information. The financial institution must report the applicant's substantive responses, that the applicant declined to answer, or its failure to respond to an inquiry, as applicable.

Final comment 107(a)(18)–2 clarifies that a financial institution must provide the applicants with definitions of the terms minority-owned business, women-owned business, and LGBTQI+-owned business when inquiring about these business statuses. A financial institution satisfies this requirement if it provides the definitions set forth in the sample data collection form in appendix E.

Final comment 107(a)(18)–3 clarifies that a financial institution may combine on the same paper or electronic data form the business status questions along with the data requested in § 1002.107(a)(19) (principal owners' ethnicity, race, and sex) and § 1002.107(a)(20) (number of principal owners).

Final comment 107(a)(18)–4 (renumbered from comment 107(a)(18)–2 in the proposal and incorporating additional information from proposed appendix F) explains that a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of an applicant's business statuses or on whether the applicant provides the information. Under the final rule, a financial institution must also inform the applicant that Federal law requires it to ask for an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled (this disclosure would have been optional under the NPRM). The Bureau believes that this notice should be compulsory, rather than voluntary, to ensure that applicants receive information about the data collection rule and its purposes. See the section-by-section analysis of § 1002.107(a)(19) for further explanation and discussion of comments received on this issue.

Final comment 107(a)(18)–5 explains that a financial institution must maintain the record of an applicant's responses to the financial institution's inquiry separate from the application and accompanying information.

Final comment 107(a)(18)–6 explains that if a financial institution does not receive a response to the financial institution's inquiry for purposes of § 1002.107(a)(18), the financial institution reports that the applicant's business statuses were "not provided by applicant."

Final comment 107(a)(18)–7 explains that a financial institution reports that the applicant responded that it did not wish to provide the information about an applicant's business statuses if the applicant declines or refuses to provide the information by selecting such a response option on a paper or electronic form. The financial institution reports an applicant's refusal to provide such information in this way, if the applicant orally declines to provide such information for a covered application taken by telephone or another medium that does not involve providing any paper or electronic documents.

Final comment 107(a)(18)–8 explains that if an applicant both provides a substantive response to the financial institution's inquiry regarding business status and also checks the "I do not wish to provide this information" box or similar for that question, the financial institution reports the applicable business status(es) provided by the applicant (rather than reporting that the applicant declined to provide the information).

Final comment 107(a)(18)–9 explains that, notwithstanding § 1002.107(b) (regarding verification of applicant-provided data), a financial institution must report the applicant's substantive response(s), that the applicant declined to answer the inquiry, or the applicant's failure to respond to the inquiry, even if the financial institution verifies or otherwise obtains an applicant's business statuses for other purposes, and provides an example of such a situation.

With regard to commenters who asserted that applicants should be able to rely upon minority-owned or women-owned business status certifications received from a third-party organization, the Bureau believes that the definitions of minority-owned or women-owned business statuses from third-party organizations may not align with the definitions found in section 1071 and codified in this rule, and thus reliance on them would not be appropriate. As addressed above, final comment 107(a)(18)–2 clarifies that a financial institution must provide applicants with definitions of the terms minority-owned business, women-owned business, and LGBTQI+-owned business, as provided in this rule, when asking questions about these business statuses.

Final Rule—LGBTQI+-Owned Business Status

For the reasons set forth herein, the Bureau is exercising its authority under ECOA section 704B(e)(2)(H) to require financial institutions to request information about whether an applicant is a LGBTQI+-owned business. The Bureau believes that the collection of this information will further section

[673] In certain instances where language in proposed appendix F and commentary to proposed § 1002.107(a)(18) and (19) were similar, language in the final regulatory text or commentary has been revised to improved clarity. In other instances, language from proposed appendix F is imported wholesale to provide clarity and streamline the rule.

1071's statutory purposes. Specifically, the Bureau believes that the collection of this information will help address an information gap about small business lending and facilitate fair lending enforcement and the identification of business and community development needs and opportunities for small businesses.

Based on the limited information available, the Bureau believes that LGBTQI+-owned businesses may experience particular challenges accessing small business credit. For example, one report found that, while LGBTQ businesses were equally likely to apply for financing, they were less likely to receive it, with about 46 percent of LGBTQ-owned businesses reporting that they had received none of the financing that they had applied for in the past year, as compared to 35 percent of non-LGBTQ businesses that applied for funding. The report noted that LGBTQ-owned businesses were more likely than non-LGBTQ businesses to explain their denial was due to lenders not approving financing for ''businesses like theirs'' (33 percent versus 24 percent), among other reasons.[674] The same report also found that LGBTQ-owned businesses that applied for Paycheck Protection Program funding in 2021 were less successful in receiving funding applied for than non-LGBTQ businesses.[675]

ECOA section 704B(e)(2)(H) provides the Bureau with broad discretion to collect ''any'' additional data it determines would aid in fulfilling the purposes of section 1071. As discussed, the Bureau has determined that the collection of business applicants' LGBTQI+-owned business status information, in addition to requiring information on principal owners' specifically held sex/gender identity, as discussed in the section-by-section analysis of § 1002.107(a)(19) below, will facilitate the purposes of section 1071 and is thus exercising its authority under section 1071 to require its collection.

[674] Spencer Watson *et al.*, Ctr. for LGBTQ Economic Advancement & Research and Movement Advancement Project, *LGBTQ-Owned Small Businesses in 2021,* 10–11 (July 2021), *http://www.lgbtq-economics.org/research/lgbtq-small-businesses-2021* (analyzing 2021 data from Small Business Credit Survey administered by the Federal Reserve Banks). As used in the report, the term ''LGBTQ-owned business'' refers to businesses where individuals who identify as lesbian, gay, bisexual, transgender, or queer own 50 percent or more of the business. *Id.* at note a.

[675] *Id.* at 8–9 (only 54 percent of LGBTQ-owned businesses received all the Paycheck Protection Program funding they applied for in 2021, and 17 percent received none of the funding applied for, compared to 68 percent and 10 percent of all non-LGBTQ owned businesses, respectively).

Similar to the proposed (and final) approaches for collecting women-owned and minority-owned business statuses, financial institutions are required to provide the definition of ''LGBTQI+-owned business'' under § 1002.102(*l*) when requesting information about an applicant's LGBTQI+-owned business status as provided by final comment 107(a)(18)–2. Financial institutions are also required to provide the same notices when requesting an applicant's LGBTQI+-owned business status, such as the notice that the applicant is not required to provide the information under final comment 107(a)(18)–1 and other notices under final comment 107(a)(18)–4. Other provisions set out in commentary for minority-owned and women-owned business statuses likewise apply to LGBTQI+-owned business status; for example, a financial institution reports only the applicant's response to the inquiry about its LGBTQI+-owned business status, even if it verifies or otherwise obtains an applicant's LGBTQI+-owned business status for other purposes. *See, e.g.,* comments 107(a)(18)–6, –7, and –9.

Final comment 107(a)(18)–5 also clarifies that an applicant's responses about whether it is an LGBTQI+-owned business must be kept separately from the small business's application form and accompanying documents. ECOA section 704B(b)(2) requires a financial institution to maintain a record of the ''responses to [the] inquiry'' required by section 704B(b)(1) separate from the application and accompanying information. As explained in part E.2 in the *Overview* to this part V, the Bureau interprets section 704B(b)(2) to refer to an applicant's responses to protected demographic information, which includes whether the applicant is a minority-owned business and/or a women-owned business, and the ethnicity, race, and sex of the applicant's principal owners. This is because these data points require financial institutions to request demographic information that has no bearing on the creditworthiness of an applicant and that financial institutions would not be otherwise able to request absent the data collection requirements under section 1071 and the final rule as a result of Regulation B's general prohibition on inquiring about the sex of an applicant or any other person in connection with a credit transaction.[676] Likewise, the Bureau considers the LGBTQI+-owned business status data point to be protected demographic information that has no bearing on an applicant's creditworthiness, as also noted by some commenters, and which financial institutions would be unable to collect without the requirement to do so in final § 1002.107(a)(18). As a result, the Bureau believes that it is necessary to require a financial institution to maintain an applicant's response to the inquiry about whether it is a LGBTQI+-owned business separately from the rest of the business's application and accompanying information under final § 1002.111(b), similar to the requirement with respect to responses about an applicant's minority-owned and women-owned business statuses.

[676] 86 FR 56356, 56386–87 (Oct. 8, 2021); *id.* at 56501–02. *See also* 12 CFR 1002.5(b).

The Bureau acknowledges commenters' concerns that requesting information as to whether applicants are LGBTQI+-owned businesses could be offensive, be considered an invasion of privacy by applicants, or damage bank-customer relationships. Final comment 107(a)(18)–4 provides that a financial institution must inform the applicant that Federal law requires it to ask for an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. Sample language for this notice, which provides a brief, plain language explanation of the purpose of the data collection, appears in the sample data collection form in appendix E. The Bureau believes providing such context will help to mitigate negative reactions an applicant may have to a financial institution's request for such information. Further, as stated on the sample data collection form, applicants have the right to refuse to provide this information, as provided under comment 107(a)(18)–1.

The Bureau acknowledges commenters' arguments that applicants are unlikely to respond to the inquiry about LGBTQI+ status and that therefore financial institutions should not be required to ask. However, the Bureau and other data users are unable to conduct comprehensive fair lending and business and community development analyses without this data point, even as applicants are individually entitled to refuse to provide it.

Some commenters expressed concern that LGBTQI+-owned business status could be detrimentally used against LGBTQI+ individuals and their businesses. As discussed in greater detail in part VIII below, the Bureau acknowledges that an individual person's LGBTQI+ status likely is sensitive personal information that could pose personal privacy risks as well as other non-personal commercial privacy risks. Part VIII also contains a more comprehensive analysis of how privacy interests may be appropriately protected. In addition, the Bureau is finalizing § 1002.110(e), which prohibits financial institutions and third parties from disclosing protected demographic information except in limited circumstances.

107(a)(19) Ethnicity, Race, and Sex of Principal Owners

ECOA section 704B(e)(2)(G) requires financial institutions to compile and maintain certain information, including the race, sex, and ethnicity of an applicant's principal owners. However, section 1071 does not set out what categories should be used when collecting and reporting this information. The Bureau proposed § 1002.107(a)(20) to address how a financial institution would collect and report the ethnicity, race, and sex of an applicant's principal owners.

Proposed § 1002.107(a)(20) would have required financial institutions to collect and report the ethnicity, race, and sex [677] of the applicant's principal owners as well as whether this information is being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). It would have also required financial institutions to report, in certain circumstances, whether ethnicity and race are being reported by the financial institution on the basis of visual observation or surname analysis. Proposed § 1002.107(a)(20) would have required financial institutions to collect and report ethnicity, race, and sex data as prescribed in proposed appendix G. Proposed appendix G would have included a requirement that a financial institution inform an applicant that the applicant is not required to respond to the financial institution's questions regarding its principal owners' ethnicity, race, or sex and would have also included a prohibition on financial institutions requiring applicants to provide this information. Proposed § 1002.107(a)(20) would have also required that when the financial institution requests ethnicity, race, and sex information from an applicant, the financial institution must inform the applicant that the financial institution cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on whether the applicant provides this information. The Bureau also put forth for public comment a sample data collection form in proposed appendix E that financial institutions would be able use to collect ethnicity, race, and sex information.

The Bureau is finalizing the statutory requirement to collect principal owners' ethnicity, race, and sex in § 1002.107(a)(19). Below, the Bureau first discusses its general approach to collecting principal owners' ethnicity, race, and sex. Second, the Bureau discusses finalizing its proposal to collect ethnicity and race information using certain aggregate categories and disaggregated subcategories. Third, the Bureau discusses its approach to requiring the collection of sex by applicant self-identification (using only a free-form text field for a paper or electronic form, or by self-description for applications taken orally) and without the use of response categories. Finally, the Bureau discusses its decision not to require collection of principal owners' ethnicity and race via visual observation and/or surname analysis. The Bureau has incorporated information from proposed appendix G into the commentary to final § 1002.107(a)(19) [678] and has updated a number of cross-references.

Proposed Rule—Collecting Ethnicity, Race, and Sex, In General

Proposed comment 107(a)(20)–1 would have clarified how a financial institution collects ethnicity, race, and sex information. It would have stated that unless a financial institution is permitted to report ethnicity, race, and sex information based on previously collected data pursuant to proposed § 1002.107(c)(2), a financial institution must ask an applicant to report its principal owners' ethnicity, race, and sex for each covered application and that the financial institution must permit an applicant to refuse to answer the financial institution's inquiry. It would have required financial institutions to inform the applicant that it is not required to provide the information. Proposed comment 107(a)(20)–1 would have further clarified that the financial institution must report the applicant's responses, its refusal to answer the inquiries, or its failure to respond to the inquiries, and explain that in certain situations, discussed in proposed comments 107(a)(20)–7 and -8 and in proposed appendix G, a financial institution may also be required to report one or more principal owners' ethnicity and race (but not sex) based on visual observation and/or surname analysis. Proposed comment 107(a)(20)–1 would have cross-referenced proposed appendix G for additional instructions.

Proposed comment 107(a)(20)–2 would have explained that a financial institution must inform the applicant that the financial institution shall not discriminate on the basis of a principal owner's ethnicity, race, or sex or on whether the applicant provides that information. It would have also clarified that a financial institution may combine this non-discrimination notice with the similar non-discrimination notices that a financial institution would have been required to provide when requesting minority-owned business status and women-owned business status if a financial institution had requested minority-owned business status, women-owned business status, and/or a principal owner's ethnicity, race, and sex in the same data collection form or at the same time.

Proposed comment 107(a)(20)–3 would have explained how, pursuant to proposed § 1002.111(b), financial institutions must record applicants' responses regarding a principal owner's ethnicity, race, and sex pursuant to § 1002.107(a)(20) separate from the application and accompanying information. This proposed comment would have also provided examples of how responses could be recorded separately from the application and accompanying information.

Proposed comment 107(a)(20)–4 would have clarified that a financial institution is required to maintain procedures reasonably designed to collect applicant-provided information pursuant to proposed § 1002.107(c)(1), including the ethnicity, race, and sex of an applicant's principal owners. However, if a financial institution is nonetheless unable to collect the principal owners' ethnicity, race, or sex from the applicant and if the financial institution is not required to report the principal owners' ethnicity and race based on visual observation and/or surname, the financial institution would have been required to report that the principal owner's ethnicity, race, or sex (as applicable) is "not provided by applicant."

Proposed comment 107(a)(20)–12 would have clarified that a financial institution is neither required nor permitted to verify the ethnicity, race, or sex information that the applicant

[677] While ECOA section 704B(e)(2)(G) uses "race, sex, and ethnicity," the Bureau reordered them to "ethnicity, race, and sex" for purposes of the proposal, so that they would appear alphabetically and for consistency with how they appear in Regulation C. The Bureau is using the same approach for this final rule.

[678] In certain instances where language in proposed appendix G and commentary to proposed § 1002.107(a)(20) were substantially similar, language in the final regulatory text or commentary has been revised to improve clarity. In other instances, language from proposed appendix G is imported wholesale to provide clarity and streamline the rule.

provides for purposes of proposed § 1002.107(a)(20), even if the financial institution verifies or otherwise obtains the ethnicity, race, or sex of the applicant's principal owners for other purposes. The Bureau also solicited comment on whether it would be useful to expressly codify this application of the principle in the commentary.

Additionally, the proposed comment would have explained that, if an applicant refuses to respond to the inquiry pursuant to proposed § 1002.107(a)(20) or fails to respond to this inquiry, the financial institution reports that the applicant declined to provide the information or did not respond to the inquiry (as applicable), unless the financial institution is required to report ethnicity and race based on visual observation and/or surname analysis. Finally, the proposed comment would have explained that the financial institution does not report ethnicity, race, or sex pursuant to proposed § 1002.107(a)(20) based on information that the financial institution collects for other purposes.

Proposed comment 107(a)(20)–5 would have explained that generally an applicant determines its principal owners and decides whether to provide information about principal owners. It would have further stated that, nonetheless, a financial institution may be required to report ethnicity and race information based on visual observation and/or surname analysis and may need to determine if a natural person with whom the financial institution meets in person is a principal owner. It would have explained how a financial institution determines who is a principal owner in the event that the financial institution may be required to report ethnicity and race information based on visual observation and/or surname. It would have also provided examples of how the financial institution can make that determination and noted that the financial institution is not required to verify any responses regarding whether a natural person is a principal owner.

The Bureau sought comment on those proposed general aspects of collecting and reporting principal owners' ethnicity, race, and sex, including comments on the challenges that financial institutions may have implementing them.

Comments Received—Collecting Ethnicity, Race, and Sex, In General

The Bureau received comments regarding the collection of ethnicity, race, and sex for applicants' principal owners, in general, from a wide range of commenters including lenders, trade associations, community groups, individual commenters, a software vendor, and others. Within these general comments, commenters addressed a number of issues including alignment with HMDA, lack of applicant responses, verification of applicant-provided data, privacy issues, and concerns related to burden and cost. These issues, and others, are discussed in turn below.[679]

General support and concerns. The Bureau received comments from lenders, trade associations, community groups, and others regarding its proposal, at a general level, for collecting information about the ethnicity, race, and sex of principal owners.

Many commenters supported the Bureau's proposal and the creation of a comprehensive small business lending database. These commenters said that collecting information about the ethnicity, race, and sex of small business applicants' principal owners will help address a lack of such information in existing lending data; facilitate enforcement of fair lending laws; and enable stakeholders to understand and identify needs and opportunities, remove barriers, and advocate for women-owned, minority-owned, and small businesses. Some commenters also emphasized generally that the data disclosure would shed light on racial and gender gaps and discrimination, which they noted are long-standing issues and which have been exacerbated by the COVID–19 pandemic. One commenter characterized the collection of this information as long overdue.

Many commenters expressing general support for the Bureau's proposal emphasized that the demographic data collected under the final rule must be robust, disaggregated, detailed, and include information on underwriting criteria and on race, gender identity, sexual orientation, and disability status in order to enable meaningful analysis.

Several lenders and a business advocacy group stated that the data would help lenders improve their lending practices. One commenter that Congress's adjustments to the SBA's Paycheck Protection Program in the program's second round, to prioritize minority-owned and women-owned businesses and microbusinesses and set aside funds for CDFIs, could not have happened without access to Paycheck Protection Program lending data, including demographic data. Another commenter stated that the small business lending data collection is necessary to gather critical data on lending beyond what is collected by the SBA.

Some commenters emphasized that HMDA data, which include demographic and socioeconomic information, have provided valuable insight on racial and income disparities in the home mortgage lending market and have been an important tool to hold lenders accountable as well as to determine how to meet unmet credit needs. Several commenters also emphasized that after Congress included demographic information as part of the HMDA data collection, the number of mortgages to people of color and people with modest incomes increased; these commenters anticipate a similar outcome for small business lending after data collected under this final rule are published.

One commenter stated that the collection of demographic data for each of an applicant's principal owners would help provide the public with a sense of the varying percentages of ownership by women or minorities above or below the 50 percent threshold for minority-owned or women-owned businesses and help determine if businesses with different minority ownership levels have distinct borrowing experiences.

The Bureau also received comments expressing generally applicable concerns and requests for clarification about its proposal for collecting ethnicity, race, and sex information. Several commenters said that the Bureau's proposal includes duplicative content in the proposed rule text, commentary, and appendices, which they said could complicate compliance. These commenters recommended that any mandatory requirements be in the final regulatory text, rather than spread out among the regulation, commentary, and appendices. Another commenter asserted that the proposed rules for collecting demographic information are too complex.

Another argued that a significant hurdle in implementing the Bureau's proposal is that while ECOA requires financial institutions to be blind to factors such as ethnicity, race, and sex in lending, they must collect and report information on those same factors under the Bureau's proposed rule (including by visual observation and surname

[679] The Bureau also received comments about specific aspects of the Bureau's proposal for collecting and reporting principal owners' ethnicity, race, and sex information, including collecting ethnicity and race using aggregate categories and disaggregated subcategories; collecting sex; and collecting ethnicity and race via visual observation and/or surname analysis in certain circumstances. Such comments are discussed further below in this section-by-section analysis of § 1002.107(a)(19).

analysis under certain circumstances). This commenter asserted that the Bureau's proposal is irreconcilable with ECOA and cannot be reasonably implemented without compromising the data collected. Another commenter predicted that requiring financial institutions to collect ethnicity, race, or sex information would lead to possible favoritism, discrimination, and stereotyping. (Similar concerns were raised specifically with respect to collection of ethnicity and race information by visual observation and/or surname analysis; these commenters are discussed separately below.)

One commenter asked the Bureau to clarify how a financial institution should report an applicant's principal owners' ethnicity, race, and sex information if a representative of a small business applicant states they need to check with the principal owners for such information, but the application is withdrawn or declined before the information is provided. The commenter stated that because borrowers may apply to many lenders for a loan, reporting on withdrawn applications would skew collected loan data. The commenter also asked for clarification about how to report under similar circumstances, where an application has been approved, but still no information has been provided. This commenter suggested the Bureau provide options for a financial institution to report that an applicant "declined to answer" for applicants that specifically refused to provide responses and "not available" for other circumstances, including withdrawn applications or applicant non-responsiveness.

Another commenter suggested that the Bureau should collect demographic data for "applicants," which it characterized as the natural persons completing the application. This commenter argued that such information would further the fair lending purposes of section 1071, because loan applicants may be subject to different treatment based on factors such as their ethnicity, race, or gender, citing a study finding that prospective loan applicants were subject to differential treatment on the basis of their race and gender in the pre-application stage.[680]

An industry commenter asked whether a financial institution could collect demographic information at a greater level of specificity than proposed by the Bureau. Another asked whether a financial institution is permitted to reconcile discrepancies or inaccuracies in self-reported ethnicity or race data with the use of software or other relevant information.

Alignment with HMDA. Some industry commenters urged the Bureau to align the collection of principal owners' ethnicity, race, and sex information under the final rule with the collection of such information for mortgage applicants under Regulation C, whether exactly or to the greatest extent possible. One commenter also suggested alignment with existing Regulation B, which also requires the collection of certain demographic information for certain mortgages.[681] These commenters said that consistency between the HMDA and section 1071 data collections would reduce confusion for financial institutions and applicants, facilitate efficient data collection such as by allowing data to be collected only once for applications covered by both HMDA and section 1071, facilitate compliance, reduce burden, and make the collected data more usable across regulations.

Several commenters identified issues that could arise for applications reportable under both section 1071 and HMDA, if the data collection requirements under the two regulatory regimes did not match. They said that financial institutions could potentially be required to collect data using different forms and to have systems capable of maintaining separate sets of data for the same transaction under the Bureau's proposal. Some also said that applicant confusion about the differences between the two regimes may reduce applicants' willingness to provide the requested information. (Commenters more specific concerns about how overlapping data collection obligations would work are discussed in more detail below.) Some commenters generally urged the Bureau to either align the HMDA and section 1071 data collection requirements or to exempt loans from one regime that are reportable under the other to avoid such issues.

Concerns related to specific transactions or institutions.[682] Some commenters expressed support for, or concerns about, the collection of principal owners' ethnicity, race, and sex information in the context of specific types of transaction or institutions.

Some commenters raised general concerns about the proposed collection of ethnicity, race, and sex information by small banks or community banks. A few commenters said that requesting ethnicity, race, and sex information has the potential to negatively impact their relationships with their customers. One stated that such inquiries could make customers distrustful of their banks and raise privacy concerns, and urged the Bureau to consider the impact that the collection of such information may have on the relationship-based banking model of community banks.

A number of commenters, including many agricultural lenders, expressed general support for the collection of demographic data. One commenter stated that the proposed collection of demographic information would help reveal and prevent unfair agricultural lending practices. Other commenters stated support for demographic data collection, provided that the rule's definition of small business is tailored for the agricultural credit context. One commenter expressed concern about the burden for collecting and reporting demographic information for agricultural lenders and farmers.

Some commenters emphasized particular difficulties for collecting ethnicity, race, and sex information for credit applications taken in retail environments (also referred to as "point of sale" applications/transactions). These commenters noted that credit applications taken in retail store environments differ from those typically taken at banks because customers expect speed and efficiency in the application process, and expressed their concern that the Bureau's proposal would add complexity and length to application processes, due in part to detailed questions about ethnicity, race, and sex.

[680] Nat'l Cmty. Reinvestment Coal., *Racial and Gender Mystery Shopping for Entrepreneurial Loans: Preliminary Overview* (2020), *https://ncrc.org/wp-content/uploads/2020/02/NCRC-Mytery-Shopping-Race-and-Gender-v8.pdf.*

[681] Under existing Regulation B, a creditor is required to collect applicant ethnicity, race, sex, marital status, and age information for an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence, where the extension of credit will be secured by the dwelling. 12 CFR 1002.13(a). Regulation B provides that the ethnicity and race information shall be requested either by using specified aggregate ethnicity and race categories, or the aggregate and disaggregated ethnicity and race categories set forth under Regulation C. *Id.*

[682] The Bureau received a number of comments responding to the Bureau's proposal regarding the collection of protected demographic information vis-à-vis certain types of institutions and transactions, many of which are discussed in the section-by-section analyses of § 1002.104 (covered transactions and excluded transactions), § 1002.105 (covered financial institutions and exempt institutions), and § 1002.107(c) (time and manner of collection). The Bureau also received comments on specific aspects of the Bureau's proposal to collect principal owners' ethnicity, race, and sex information, in the context of specific types of institutions and transactions. See the Bureau's discussion of such comments in the referenced parts of this preamble for more detail.

These commenters also expressed concerns about having retail store associates ask for this information. Commenters said that many retailers may use oral, interview-style, in-store application processes, and that retail store associates do not have the training to make such inquiries or handle customer questions or reactions. Several commenters also stated that small business applicants may feel uncomfortable providing ethnicity, race, and sex information in public retail spaces. Another commenter predicted that the majority of small business credit applications submitted at the point of sale would lack demographic information. Some of these commenters also urged the Bureau to exempt private label and co-branded credit applications, along with other types of credit originated at or facilitated through retailers such as revolving lines of credit and installment loans (*e.g.,* point of sale credit), from the rule's requirements in various ways—such as by exempting all such applications, or those for lines of credit below $50,000, from the requirement to collect demographic information.

A group of trade organizations stated that insurance premium finance transactions should not be included within the scope of the final rule, in part because State insurance law generally prohibits or discourages insurance agents from collecting information about race, religion, national origin, or ethnicity of an insured business's owners on behalf of lenders, and insurers do not collect such information as a result.

Several other trade associations urged the Bureau to clarify how the rule's data collection requirements apply to indirect vehicle finance transactions. Beyond generally urging the Bureau to exempt such transactions from the final rule, two trade associations stated a survey of their automobile and truck dealer members reflected concerns about training employees to collect ethnicity, race, and sex information, particularly with respect to implementing the Bureau's proposed visual observation and surname data collection requirement.

Lack of applicant responses. Several commenters raised concerns about a potential lack of applicant responses to the proposed demographic information questions.[683] A bank stated that it encounters difficulties in meeting the HMDA reporting requirements because mortgage loan applicants are reluctant to provide demographic information and it anticipates similar reactions from small businesses. Other commenters argued that low demographic response rates in the Paycheck Protection Program indicates that most small business applicants will likely decline or fail to provide demographic information. Thus, some commenters said, records with missing demographic data will likely need to be either excluded from fair lending analyses or data users will have to use proxies for the missing information, asserting that this outcome calls into question the benefits of the data collection versus the costs. Another commenter said that the high number of applications for small business credit made online, and situations where the person providing information for a given application may be one of several owners or a company officer and not an owner themselves, may also lead to a high percentage of applicants who do not provide responses. One commenter asserted that small business owners may react negatively to the amount of paperwork associated with this rule's data collection requirements and as a result decide not to provide their principal owners' information. Finally, a commenter suggested that the Bureau require demographic information to be collected after a credit decision has been made, rather than before.

Verification. Several industry commenters and a women's business advocacy group argued that financial institutions should not be required or permitted to verify applicant-provided data about a principal owner's ethnicity, race, or sex. One commenter suggested that the Bureau should determine if there are ways for it to verify if reported data are accurate and correct. (Similar comments specifically regarding collection of information via visual observation or surname are discussed in more detail below.)

Reduced demand for traditional credit. Several industry commenters asserted that the collection of principal owners' protected demographic information could potentially make borrowing from traditional lenders less attractive for small businesses due to applicant discomfort or objections to inquiries for such information. One predicted that applicants may, as a result, turn to credit cards, payday loans, or nontraditional online financing for their credit needs.

Privacy. Several industry commenters stated that small business customers may find the collection of protected demographic information that could become public to be an invasion of privacy. They generally expressed concern that such information could be used to re-identify borrowers, which could in turn harm the reputation or image of a small business applicant. A bank said this concern is particularly salient in small communities, and that if public information is used to determine the identities of a bank's customers and the pricing terms offered to them, it could result in a competitive disadvantage for the bank versus other lenders.

Burden and costs for collecting ethnicity, race, and sex information. Several industry commenters raised concerns about the burden or compliance costs for financial institutions associated collecting principal owners' ethnicity, race, and sex information under the proposal. Other commenters raised similar concerns in the context of specific types of transactions or institutions, or related to specific aspects of the Bureau's proposal for collecting this information, which are discussed in the relevant parts of this section-by-section analysis.

One commenter expressed concern that financial institutions may need to increase the prices and fees for credit to cover increased compliance costs related to the collection and storage of ethnicity, race, and sex information. Another stated that collecting principal owners' ethnicity, race, and sex information would require online lenders to make system changes, which it said would be different from those needed by traditional lenders. This commenter urged the Bureau to allow lenders to report aggregate, as opposed to application level, data to reduce this burden. Another commenter said that because does not currently collect ethnicity information currently and its core processing system does not include a field for this information, it would need to collect this data field manually.

One commenter stated that collecting information for up to four principal owners as proposed would be burdensome for both financial institutions and applicants. A lender said that reporting such information for all principal owners would take a large amount of space on its small business lending application register. That commenter also suggested that the Bureau require demographic information for only one principal owner instead of all principal owners, asserting that this would not impact the quality of the data because the

[683] A number of commenters also expressed concerns about data quality in the specific context of their comments about the Bureau's proposal to require financial institutions to collect at least one principal owners' race and ethnicity information via visual observation and/or surname under certain circumstances. These comments are discussed in more detail below.

applicant's minority-owned and women-owned business statuses would still be collected.

In contrast, another lender did not anticipate incurring significant costs related to the collection of ethnicity, race, and sex information because it already gathers such information or similar information for other small business lending programs and funding opportunities such as the SBA's 7(a) Loan Program; the Paycheck Protection Program; the Wells Fargo Diverse Community Capital Program; and the CDFI Fund. The commenter stated that adjusting to section 1071 data collection requirements will primarily entail updating software, compliance training, and updating materials. The commenter anticipated minimal ongoing costs that will be considered normal costs of doing business and said it does not plan on raising fees or restricting access to credit as a result. The commenter also urged the Bureau to coordinate with the CDFI Fund to streamline section 1071 reporting requirements.

Direct reporting to the Bureau or third parties, or use of other data sources. A number of industry commenters suggested that protected demographic information should be self-reported by applicants directly to a central database or registry, whether maintained by the Bureau or by third parties.

Some commenters urged the Bureau to work with Secretaries of State so that demographic data generally or information about a business's minority-owned, women-owned, and/or LGBTQI+-owned business statuses are voluntarily registered at the same time that a small business registers with its State. One commenter stated that this would allow small businesses to provide information to a trusted entity and lenders could then verify demographic data with the relevant State—thus avoiding delays and confusion from applicants during the loan application process.

Other commenters suggested that the Bureau provide ways for small businesses to report their demographic information directly to the Bureau. Several suggested the Bureau develop a form for the collection of ethnicity, race, and sex information that could be sent directly to the Bureau. Others suggested that the Bureau establish a tool, portal, or online system for applicants to input their demographic information or to certify their desire to not provide information. One commenter stated that the regulatory trend has shifted from requiring collection and reporting of beneficial ownership information by financial institutions to having small businesses report directly to the government. Generally, these commenters said that applicants should be provided with a unique identifier, either by the Bureau or the financial institutions, that could be used to match applicant demographic information with loan information. Several commenters said that the financial institution should also be given the ability to match its records with the central database, to enable their internal fair lending compliance monitoring efforts. Some commenters also suggested the Bureau coordinate with other Federal agencies, such as the SBA, U.S. Department of the Treasury, Internal Revenue Service, or the U.S. Census Bureau, to develop the database, gather information for other data points, or purge records as necessary.

Some of these commenters stated that direct reporting to the Bureau would avoid the need for financial institutions to collect ethnicity and race information via visual observation or surname analysis. These commenters also stated that this would resolve privacy concerns applicants may have in providing demographic information to their lenders. Commenters also asserted that direct reporting would inform applicants of the Bureau's role in the data collection, promote applicant self-reporting of demographic information, and likely increase response rates because it would provide applicants with assurances of confidentiality and because applicants would not be concerned that financial institutions would improperly use the data.

Several commenters argued that direct reporting to the Bureau would have other benefits for financial institutions, including lessening or eliminating the risk of inappropriate use of demographic data by financial institutions; reducing a financial institutions' compliance costs and burden; avoiding the need for financial institutions to establish firewalls; lowering litigation and regulatory risk; reducing the risk of reputational harm for asking for sensitive data; and lowering barriers to entry in financial services. Commenters also stated that direct reporting would be more efficient for applicants because information would be maintained in one place and could be updated as needed, as opposed to being provided for each application. Commenters further suggested that the Bureau would benefit from receiving real-time data on applicant demographics, which they claimed would simplify and enhance analysis and publication and would allow the Bureau to directly manage the collection, storage, and standardization of the data.

Some commenters suggested that instead of requiring financial institutions to collect data, the Bureau should coordinate with other government agencies, like the Internal Revenue Service and the U.S. Census Bureau, which already collect demographic and other data on small businesses, to avoid burden to financial institutions and which would result in the Bureau having better data to use for analyses. One commenter suggested that the Bureau should use the demographic analysis approach being used by the U.S. Census Bureau and develop educational materials for financial institutions about the methodology. Another commenter suggested the Bureau buy information from Google or Facebook.

Applicant and financial institution education and guidance. A range of commenters urged the Bureau to provide education and guidance about the final rule for applicants, the public, and financial institutions. The commenters generally stated that the Bureau should engage in an education and/or media campaign to explain the final rule and its purposes to develop trust with small business communities and comfort for applicants by explaining the role of the data collection for facilitating fair lending and to encourage small businesses to provide their protected demographic information.

Many of these commenters also suggested that the Bureau develop guidance and materials such as frequently asked questions and factsheets to explain the rule and its purposes. A few commenters suggested developing materials for applicants regarding the ethnicity, race, and sex data collection inquiries, such as how to respond if a principal owner is multi-ethnic or multi-racial, so applicants can accurately respond and financial institution employees are not asked to interpret or clarify such requirements.

Commenters also recommended developing guidance materials for financial institutions to use in explaining the final rule, including training resources and disclosures to explain the reasons and purpose for the data collection. They also suggested that such materials be translated into the top ten languages spoken in the United States according to the U.S. Census Bureau.

Final Rule—Collecting Ethnicity, Race, and Sex, in General

For the reasons set forth herein, the Bureau is finalizing the requirement to collect principal owners' ethnicity, race, and sex with certain changes. Among other things, the Bureau is: (1) finalizing its proposed requirement for financial institutions to collect ethnicity and race information using aggregate categories and disaggregated subcategories, using the specific categories and subcategories in the proposal; (2) finalizing the requirement for financial institutions to collect information about a principal owner's sex, which generally will permit an applicant to respond to an inquiry about the principal owner's "sex/gender" through free-form text or self-description for oral applications; and (3) not finalizing its proposed requirement to collect and report at least one principal owner's ethnicity and race information on the basis of visual observation and/or surname analysis under certain circumstances. These three specific aspects of the final rule are each discussed in detail below.

Final § 1002.107(a)(19) (proposed as § 1002.107(a)(20)) requires financial institutions to collect and report information about the ethnicity, race, and sex of small business applicants' principal owners. In line with the proposal, final § 1002.107(a)(19) provides that when requesting such information from an applicant, the financial institution must inform the applicant that it cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on the basis of whether the applicant provides this information (non-discrimination notice).

The final rule does not require a financial institution to report whether the reported ethnicity, race, and sex information was based on previously collected data (as permitted by proposed comment 107(c)(2)–7). This information would have provided additional context for the Bureau and others when application method was reported as being other than in-person but ethnicity or race information were reported as collected through visual observation or surname. Because the Bureau has decided not to require the use of visual observation and surname analysis in the final rule, however, the Bureau does not believe that capturing information about data reuse is still necessary and thus has removed that requirement from final § 1002.107(a)(19) to streamline and facilitate compliance.

The Bureau acknowledges commenters' concerns about repetition across the rule's regulatory text, commentary, and appendices, and has made a number of changes to reduce duplication and otherwise streamline this aspect of the final rule to facilitate compliance. In particular, the Bureau has removed proposed appendix G, relocating unique content into the commentary for final § 1002.107(a)(19). The Bureau has also adjusted the commentary accompanying final § 1002.107(a)(19) to reflect changes to the regulatory text described above, as well as the addition of LGBTQI+-owned business status where women- and minority-owned business statuses are mentioned.

Final comment 107(a)(19)–1 generally clarifies how a financial institution must ask an applicant for its principal owners' ethnicity, race, and sex. The financial institution must permit an applicant to refuse to answer the financial institution's inquiries and must inform the applicant that it is not required to provide the information. It also establishes how a financial institution reports the applicant's responses to its inquiries about ethnicity, race, and sex.

Final comment 107(a)(19)–2 (incorporating instruction 3 from proposed appendix G) explains that a financial institution must provide an applicant with the definition of principal owner in final § 1002.102(o) and that a financial institution satisfies the requirement if it provides the definition as set forth in the sample data collection form in final appendix E.

Final comment 107(a)(19)–3 (incorporating instruction 2 from proposed appendix G) explains that a financial institution may combine on the same paper or electronic data collection form the questions about a principal owner's ethnicity, race, and sex with the number of the applicant's principal owners pursuant to § 1002.107(a)(20) and the applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses pursuant to § 1002.107(a)(18).

Final comment 107(a)(19)–4 (based on proposed comment 107(a)(20)–2) explains that the non-discrimination notice required when a financial institution requests a principal owner's ethnicity, race, and sex may be combined with the non-discrimination notice that is required when requesting information about an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses, when such information is collected on the same form or at the same time. The comment has been updated to reflect the addition of LGBTQI+ business status to final § 1002.107(a)(18), and to state that a financial institution must (as opposed to "may" as proposed) inform an applicant that Federal law requires it to ask for the principal owners' ethnicity, race, and sex/gender to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled, for reasons discussed further below.

Final comment 107(a)(19)–5 (based on proposed comment 107(a)(20)–3) provides that a financial institution must maintain the record of an applicant's responses to inquiries pursuant to § 1002.107(a)(19) separate from the application and accompanying information, and cross-references final § 1002.111(b) and comment 111(b)–1.

Final comment 107(a)(19)–6 (based on proposed comment 107(a)(20)–4) addresses reporting when information about a principal owner's ethnicity, race, or sex is not provided by an applicant. While a financial institution must maintain procedures reasonably designed to collect applicant-provided data, the comment acknowledges that there may be circumstances under which an applicant does not provide ethnicity, race, or sex information. The final comment has also been updated to include explanatory examples, including examples from proposed appendix G (instruction 13).

Final comment 107(a)(19)–7 (adapted from instruction 12 in proposed appendix G) addresses how a financial institution reports an applicant's response that it declines to provide information about a principal owner's ethnicity, race, or sex.

Final comment 107(a)(19)–8 (adapted from instruction 16 in proposed appendix G) addresses how a financial institution reports an applicant's conflicting responses for its principal owner's ethnicity, race, or sex information, when the applicant selects a response option indicating it does not wish to provide the information but also selects an answer option providing a substantive response to the question at issue.

Final comment 107(a)(19)–9 (based on proposed comment 107(a)(20)–12) explains that a financial institution reports principal owners' ethnicity, race, and sex information as provided by the applicant, even if the financial institution verifies or otherwise obtains such information for other purposes. This comment no longer references collection of ethnicity and race via visual observation or surname.

Final comment 107(a)(19)–10 (substantially adapted from instruction 25 of proposed appendix G and proposed comments 107(a)(20)–6.iv, –7.iv, and –8) addresses how to report ethnicity, race, and sex information for an applicant with fewer than four principal owners.

Final comment 107(a)(19)–11 (substantially adapted from instruction 26 of proposed appendix G) explains that a financial institution reports one or more principal owners' ethnicity, race, or sex information based on previously collected data under § 1002.107(d), the financial institution does not need to collect any additional ethnicity, race, or sex information for other principal owners (if any).

Final comment 107(a)(19)–12 (substantially adapted from instruction 24 of proposed appendix G) explains that a guarantor's ethnicity, race, and sex is not collected or reported unless they are also a principal owner of the applicant.

General support and concerns. The Bureau agrees with commenters that the statutorily required collection of detailed ethnicity, race, and sex information about small business applicants' principal owners will facilitate the stated purposes of section 1071 to assist in the enforcement of fair lending laws and enable communities, governmental entities, and creditors to understand and identify needs and opportunities of women-owned, minority-owned, and small businesses.[684] The collection of ethnicity, race, and sex information in the HMDA context under Regulation C, for example, is essential to the Bureau's efforts to monitor financial institutions for fair lending compliance in the home mortgage market and to efforts by the Bureau, policymakers, and others to identify trends, gaps, and potential solutions for addressing any issues uncovered by the data. Recent changes to Regulation C to collect disaggregated ethnicity and race data have also added to the Bureau's and others' understanding of the home mortgage marketplace.[685] The Bureau believes that the collection of principal owners' ethnicity, race, and sex information will similarly provide important insights into the small business lending market and help enable the identification of potential discriminatory lending.

The Bureau also agrees that in combination with other collected information such as the number of an applicant's principal owners under final § 1002.107(a)(20) and whether the applicant is a minority-owned, women-owned, and/or LGBTQI+-owned small business under final § 1002.107(a)(18), the collection of principal owners' ethnicity, race, and sex information will help the Bureau and others to understand lending market dynamics at different levels of ownership by individuals of certain ethnicities, races, and/or sexual or gender population subgroups. Transparency will not only help facilitate fair lending enforcement, but reduce uncertainty for financial institutions and help them to identify areas of unmet credit demand into which they could consider increasing product availability. In turn, small business owners will benefit from increased credit availability. The Bureau believes that other information about a covered application is still important for fulfilling section 1071's statutory purposes even when the applicant has declined to provide any protected demographic information. Such information can still provide insight into lending to small businesses pursuant to section 1071's business and community development purpose. Moreover, the lack of demographic information for a covered application itself could be important information for the Bureau and others to assess potential reasons for and solutions to correct such information gaps in the future.

Regarding the comment its proposed rules for collecting demographic data are too complex, and comments that suggested streamlining these provisions, the Bureau notes that it is not finalizing the proposed requirement to collect ethnicity and race via visual observation or surname data. As a result, the Bureau has removed that provision, and related requirements, from the final rule. The Bureau has also moved all instructions and information about collecting and reporting ethnicity, race, and sex information to the commentary for final § 1002.107(a)(19). The Bureau believes these changes streamline and simplify the ethnicity, race, and sex data collection requirements, which will facilitate financial institutions' compliance with the final rule.

Regarding a commenter's assertion that this data collection requirement conflicts with ECOA, the Bureau notes that section 1071 amends ECOA to *require* the collection of the race, sex, and ethnicity of the principal owners of small businesses. Moreover, ECOA also provides that inquiries to collect data under section 1071 are not considered discrimination under the statute.[686] The final rule also includes protections against the improper use of protected demographic information, including the firewall requirement in final § 1002.108, the provision restricting re-disclosure of protected demographic information in final § 1002.110(e), and the recordkeeping requirements in final § 1002.111(b).

Regarding a commenter's request for clarification as to how a financial institution should report these data if responses were provided by an applicant's representative before action is taken on the application, or that an applicant declined to provide the requested information. As discussed above, final comments 107(a)(19)–1, –6, and –7 clarify the various reporting options for reporting data collected pursuant to final § 1002.107(a)(19): financial institutions will be required to report an applicant's responses to the ethnicity, race, and sex inquiries; their selection of a response that they decline to provide information (*e.g.,* by selecting an answer option of "I do not wish to provide this information" or similar); and a response of "not provided by the applicant" if an applicant does not provide any response. The final rule also requires an applicant to report the action taken on an application under § 1002.107(a)(9), including whether originated or if the application was withdrawn by the applicant or is incomplete. Given these provisions, the Bureau does not believe it is necessary to include an option for a financial institution to indicate that the applicant or a principal owner was not available, as suggested by the commenter.

The Bureau is not requiring the collection of demographic information for a natural person completing an application on behalf of a small business, as suggested by a commenter. ECOA section 704B(e)(2)(G) specifically requires financial institutions to compile and maintain information about the ethnicity, race, and sex of "the principal owners of the business." The statute does not require financial institutions to collect such information for any other individuals. The Bureau acknowledges the possibility of discrimination occurring against an applicant's non-principal owner representative, but in light of the statutory directive to collect demographic information about the applicant' principal owners, and the associated complexity that adding such a requirement could involve, the Bureau does not believe that it would be appropriate to adopt such a requirement at this time. The Bureau may, however, revisit at a later date whether the collection of such information would aid in fulfilling the purposes of section

[684] *See* ECOA section 704B(a).

[685] In 2015, the Bureau issued a final rule (2015 HMDA Rule) amending Regulation C to incorporate several changes made under the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* 80 FR 66128 (Oct. 28, 2015). One of the changes that was implemented was the collection of mortgage applicants' race and ethnicity information using aggregate categories and disaggregated subcategories. *Id.* This data has been used by the Bureau, for example, to examine how home buying experiences differ among Asian American and Pacific Islander subgroups. *See* CFPB, *Data Point: Asian American and Pacific Islanders in the Mortgage Market* (July 2021), *https://files.consumerfinance.gov/f/documents/cfpb_aapi-mortgage-market_report_2021-07.pdf.*

[686] 15 U.S.C. 1691(b)(5).

1071 in the future as it enhances its understanding of the small business credit marketplace.

Regarding a commenter's inquiry as to whether a financial institution could collect more specific demographic data than required by the rule. Final § 1002.107(a)(19) establishes that financial institutions must inquire about applicants' principal owners' ethnicity, race, and sex and must permit applicants to provide certain specified responses; certain responses include the option of providing additional information via free-form text field.

One commenter asked whether a financial institution can reconcile discrepancies or inaccuracies in applicants' self-reported ethnicity or race data. Final comment 107(a)(19)–1 provides that the financial institution is not permitted to report a principal owner's ethnicity, race, or sex on any basis other than applicant-provided data, which may include previously provided data pursuant to final § 1002.107(d). As a result, financial institutions must report applicant responses as provided by the applicant, even if the institution perceives possible discrepancies or inaccuracies.

Alignment with HMDA. The Bureau generally agrees with commenters that some degree of alignment with the HMDA data collection requirements under Regulation C would promote consistency and may reduce potential confusion for financial institutions, applicants, and data users. However, the Bureau does not believe that the collection of data as to small business owners should necessarily be the same in each aspect as it is for home mortgage applicants. Although the collection of ethnicity, race, and sex data in both contexts serves related fair lending purposes, Regulation C and this final rule are authorized under different statutes and for different markets. Further, both Regulation C and this final rule were developed in consideration of the information available to the Bureau at the time of each rulemaking, including comments received in response to the Bureau's proposals and current research and standards as to the measurement of such factors. As demographic data collection best practices and standards evolve, the Bureau considers such information in its decision-making. The Bureau refers readers to the relevant parts of this section-by-section analysis for discussion of its rationale for its decisions on the collection of ethnicity, race, and sex.

The Bureau notes that it is exempting HMDA-reportable transactions from the data collection requirements of this final rule due to, in part, to commenters' concerns about potentially duplicative and/or inconsistent requirements for reporting ethnicity, race, and sex. See the section-by-section analysis of § 1002.104(b)(2) for additional information.

Concerns related to specific transactions or institutions. The Bureau is not adopting special rules for the collection of protected demographic information for particular types of transactions or lenders. The Bureau believes it is important to collect nationwide, comprehensive ethnicity, race, and sex data for all covered applications to fulfill the purposes of section 1071. However, the Bureau acknowledges commenters' concerns about the potential challenges in collecting such information in certain situations or for certain types of lenders and appreciates, in particular, the importance of trust in furthering important relationships between small businesses and their local banks. For this reason, among others, the Bureau is not finalizing its proposal to collect ethnicity and race information via visual observation or surname analysis, as explained further in the relevant part of this section-by-section analysis below.

To help applicants' understanding of the section 1071 data collection, the Bureau has made edits to the sample data collection form in final appendix E to include sample text that explains the purpose of the rulemaking and clarifies that the inquiries on the form for an applicant's status as a minority-owned, women-owned, and/or LGBTQI+-owned small business and its principal owners' ethnicity, race, and sex information are required under Federal law. The sample form, of course, continues to note that applicants are not required to provide any of the requested demographic information. The Bureau also anticipates developing materials to help small businesses understand the rule, as described at the end of part I above.

The Bureau does not believe that agricultural credit transactions should be viewed or treated differently from other covered transactions under the final rule, with regard to the collection of principal owners' ethnicity, race, or sex information. As explained in the section-by-section analysis of § 1002.104, generally there is insufficient information available about agricultural credit markets; nevertheless, there is evidence that these markets are affected by historical and/or continuing discrimination. Moreover, farms are an important means of capital formation for families and communities. Collecting principal owners' ethnicity, race, and sex information for agricultural credit transactions will help facilitate the Bureau's and others' understanding of the agricultural credit sector of the small business lending marketplace and will help to further the enforcement of fair lending laws for that part of the market. The Bureau also anticipates that the collection of this information may increase access to responsible and affordable agricultural credit for a diverse cross-section of the population, by helping creditors and others identify needs of and opportunities for small farms, including those that are minority-, women-, and/or LGBTQI+-owned.

Likewise, the Bureau is not adopting separate rules or exemptions for credit applications taken at point of sale. As explained further in the section-by-section analysis of § 1002.107(c), regarding the time and manner of collection, the Bureau generally believes that the same rules should apply across all covered credit transactions and covered financial institutions, and that the arguments made by point of sale providers are not unique in nature or can be addressed through other means. Likewise, the Bureau does not believe there should be special considerations for the collection of ethnicity, race, and sex information for private label credit, for which commenters raised similar concerns.

Because the Bureau is exempting insurance premium financing transactions from coverage under the final rule in § 1002.104(b)(3), commenters' concerns summarized above about collecting protected demographic information for such transactions are rendered moot.

With regard to comments raising concerns about collecting ethnicity, race, and sex information in the context of indirect auto finance transactions, the Bureau refers readers to its discussion at the section-by-section analysis of § 1002.109(a)(3). As discussed there, the Bureau believes that auto dealers are generally unlikely to be collecting 1071 data on behalf of covered financial institutions because they are often the last entity with authority to set the material credit terms of a covered credit transaction. But even in situations where dealers are acting as conduits and are thus collecting information on behalf of another financial institution, comment 5(a)(2)–3 to the Board's Regulation B states that persons such as loan brokers and correspondents do not violate ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to HMDA or another Federal or State statute or regulation requiring data collection.[687] The Bureau also does not believe that any specialized knowledge is necessary to collect 1071 data if dealers do collect such data.

Lack of applicant responses. The Bureau acknowledges concerns raised by commenters about the potential for low applicant response rates to the required inquiries for information about their principal owners' ethnicity, race, and sex. As discussed in the NPRM, such concerns motivated the Bureau's proposal to require financial institutions to collect at least one principal owner's ethnicity and race information through visual observation and/or surname analysis under certain circumstances. The Bureau explained that the similar data collection requirement for the HMDA data collection has been an important tool in supporting response rates.

As discussed in more detail regarding the Bureau's proposal that financial institutions collect principal owners' ethnicity and race via visual observation or surname in certain circumstances, the Bureau believes that such a requirement could help support response rates in the right context. However, at this time, the Bureau has elected to address concerns about applicants' potential unwillingness to voluntarily provide their principal owners' ethnicity, race, and sex information by providing further clarification as to the requirement that an institution maintain procedures to collect applicant-provided data at a time and in a manner that are reasonably designed to obtain a response under final § 1002.107(c). For example, final § 1002.107(c)(2) sets forth minimum criteria when collecting applicant-provided data directly from the applicant that must be included within a financial institution's procedures to ensure they are reasonably designed to obtain a response, including seeking to collect such information before notifying an applicant of action taken on a covered application, ensuring that the request for applicant-provided data is prominently displayed or presented, ensuring the collection does not have the effect of discouraging applicants from providing a response, and ensuring that applicants can easily respond to a request for the data. The Bureau also anticipates developing materials to educate small business owners about the small business lending data collection and its purposes, which may impact their willingness to provide demographic information. Further, as discussed in the section-by-section analysis of final appendix E, the sample data collection form will also include language that explains, in plain language, the purpose for the collection of demographic information under the final rule. At this time, the Bureau believes that these measures will improve applicant response rates to the protected demographic information inquiries under the final rule. However, the Bureau will continue to assess whether and what further measures may be needed to improve response rates.

The Bureau's decision not to change the timing for collecting protected demographic information to after a credit decision has been made, as suggested by a commenter, is discussed in the section-by-section analysis of § 1002.107(c).

Verification. Commenters urged the Bureau to provide that financial institutions are not permitted or required to verify the ethnicity, race, or sex of a principal owner and to codify this requirement in the final rule. The Bureau agrees. Final comment 107(a)(19)–9 clarifies that a financial institution may only report an applicant's responses as to its principal owners' ethnicity, race, and sex, even if it verifies or otherwise obtains the information for other purposes.

Reduced demand for traditional credit. The Bureau appreciates some commenters' concerns that inquiries about their principal owners' ethnicity, race, and sex information might discourage small businesses from seeking credit with traditional lenders. The Bureau anticipates that while there may be some period of initial hesitation by small businesses to provide such information, small businesses will become more familiar with the requests for their demographic information over time and such requests will be considered a normal part of the process for seeking business credit. Further, as described at the end of part I above, the Bureau anticipates developing and distributing materials about the final rule directed at small businesses. The Bureau also expects that such materials, by furthering applicant understanding of the 1071 data collection, will ease the compliance burden for financial institutions in implementing the final rule.

Privacy. The Bureau received comments generally expressing concerns that small businesses' owners' demographic information could be used to identify the businesses and their owners. As discussed in greater detail in part VIII below, after receiving a full year of reported data, the Bureau will assess privacy risks associated with the data and make modification and deletion decisions to the public application-level dataset. The Bureau takes the privacy of such information seriously and will be making appropriate modifications and deletions to any data before making it public, and intends to continue engage with the public about how to mitigate privacy risk.

With respect to concerns that small business applicants may find the collection of protected demographic information to be an invasion of privacy, in amending ECOA to require the collection of an applicant's principal owners' ethnicity, race, and sex information, Congress implicitly determined that the benefits of collecting such information outweigh any invasion of privacy concerns. Nevertheless, the Bureau notes that it has included sample language in the sample data collection form in appendix E explaining the purpose of the data collection, and, as noted, it anticipates developing materials to further help small businesses understand the purposes of the rule. In addition, the final rule provides safeguards for applicants' protected demographic information by requiring that such information be kept separately from their applications and accompanying information under § 1002.111(b), through the firewall requirement in § 1002.108, and in § 1002.110(e) restricting financial institutions' re-disclosure of protected demographic data to third parties.

Burden and costs for collecting ethnicity, race, sex information. The Bureau appreciates that financial institutions will face some initial costs and burden in implementing the final rule, such as from making changes to its policies, procedures, systems, training programs, and in other areas. However, as noted by one commenter, the Bureau believes that for many financial institutions covered by the final rule, there will be manageable ongoing costs related to the data collection after an initial implementation period.

The Bureau does not believe it would be appropriate to permit financial institutions to report only aggregate data, as opposed to application-level data, as suggested by one commenter. First, the statute clearly contemplates the collection of individual loan-level information. Section 1071's information gathering requirement provides that a financial institution is required to collect and maintain information "in the

[687] This language aligns with comment 5(a)(2)–3 in the Bureau's Regulation B, to which the Bureau is adding a reference to subpart B for additional clarity.

case of *any* application to a financial institution . . .'' (emphasis added).[688] Further, the statute requires the financial institution to compile and maintain ''a record of the information provided by any loan applicant,'' including loan identifying information such as the number of the application and the date on which the application was received.[689] Given this language, the Bureau believes that Congress intended that financial institutions compile and maintain application-level information and submit the information—compiled in that way—to the Bureau.

Second, the Bureau believes that it is necessary to have specific ethnicity, race, and sex data for individual principal owners to allow assessments of whether there are trends in the data, including for businesses with different amounts of ownership by individuals of certain ethnicities, races, or sex, which cannot be captured through the minority-owned, women-owned, and LGBTQI+-owned business status data points alone. As a result, the Bureau rejects a commenter's suggestion that the Bureau require the collection of only one principal owner's ethnicity, race, and sex information.

Direct reporting to the Bureau or third parties, or use of other data sources. The Bureau is not, at this time, establishing a mechanism by which small businesses might directly submit demographic information to the agency. The Bureau notes, in this respect, that the statute calls for *financial institutions* to collect these data and report them to the Bureau. In addition, the mechanisms described by the statute do not envision the Bureau ever knowing the identity of any small business submitting data, which would occur if small businesses were to file demographic data directly with the Bureau.

However, the final rule does not foreclose industry from developing mechanisms to make demographic data collection and submission more effective or efficient. For example, industry might seek to foster the development of third-party mechanisms that would let financial institutions collect and report demographic information in tokenized form so that they themselves do not have access to that demographic data. To the extent that industry stakeholders are interested in the development of such mechanisms in connection with meeting their obligations under the final rule, the Bureau is willing to engage with them on these issues in order to ensure that any such developments ensure appropriate data quality and protection, do not burden or create obligations for applicants, and otherwise accord with the rule and the statute; to the extent necessary and appropriate, the Bureau would also need to adjust certain regulations and technical guidance. In considering appropriate data quality and protection, the Bureau will want to ensure that such a third-party system does not compromise privacy or other important protections or create opportunities for the sale of personal data.

Some commenters suggested that, as opposed to requiring financial institutions to collect and report demographic data, the Bureau should instead use data, for example, that is gathered by other Federal agencies or buy it from outside sources. However, Congress's intent with ECOA section 704B was to require financial institutions to collect demographic information from applicants that would then be reported to the Bureau. Gathering such information from other sources would not be aligned with this intent. Further, the Bureau believes that requiring financial institutions to collect demographic information during the application process will help to ensure comprehensive, nationwide demographic data collection about small business lending, which will in turn help enable the identification of potential discriminatory lending practices and identification of the needs and opportunities of small businesses, including women-owned, minority-owned, and LGBTQI+-owned businesses. Data that have been collected in other contexts and for other purposes, and analyzed pursuant to those agencies' methods for those other purposes, would not achieve what the Bureau believes is necessary to meet section 1071's statutory objectives. Further, some of the approaches suggested by commenters would not be feasible, such as buying data from sources outside of the Federal government, because they do not identify a small business applicant's principal owners. The Bureau also notes that it has worked with other Federal regulators so that they can tailor data collections in this area to take advantage of data collected under this rule, thereby reducing burden on regulated entities.

Applicant and financial institution education and guidance. With respect to commenters' requests that the Bureau educate and explain the final rule and its requirements to small business applicants, the public, and financial institutions, and to provide translations of the sample data collection form into other languages, the Bureau refers readers to its discussion regarding compliance and technical assistance at the end of part I above. Likewise, the Bureau agrees with commenters that it is important to provide a disclosure to applicants to generally explain the rule and its purpose. Instruction 4 to proposed appendix G would have explained that a financial institution may inform applicants that Federal law requires it to ask for the principal owners' ethnicity, race, and sex to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. In response to comments about the importance of helping applicants to understand the reasons for the data collection,[690] under the final rule financial institutions are required to provide such information (see final comment 107(a)(19)–4); sample language effecting this provision is included on the sample data collection form at appendix E.

Proposed Rule—Collecting Ethnicity and Race Using Aggregate Categories and Disaggregated Subcategories

The Bureau proposed that financial institutions request principal owners' ethnicity and race using both aggregate categories as well as disaggregated subcategories.

With respect to ethnicity data collection, the Bureau proposed using the same aggregate categories (*i.e.,* Hispanic or Latino and Not Hispanic or Latino) and disaggregated subcategories as are used in Regulation C. With respect to race data collection, the Bureau proposed using the same aggregate categories as are used in Regulation C (*i.e.,* American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White). The Bureau also proposed using the same disaggregated subcategories for the Asian race category and the Native Hawaiian or Other Pacific Islander race category, as well as with respect to the American Indian or Alaska Native race category, including by inviting an applicant to provide the name of a principal or enrolled tribe. In addition, the Bureau proposed adding disaggregated subcategories for the Black or African American race category, which are not used when

[688] ECOA section 704B(b).

[689] ECOA section 704B(e)(2).

[690] This was reaffirmed in user testing. *See* CFPB, *User testing for sample data collection form for the small business lending final rule* at app. A (Mar. 2023), *https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/*.

collecting data pursuant to Regulation C.

The Bureau explained that OMB has issued standards for the classification of Federal data on ethnicity and race.[691] OMB's government-wide standards provide a minimum standard for maintaining, collecting, and presenting data on ethnicity and race for all Federal reporting purposes. These standards have been developed to provide "a common language for uniformity and comparability in the collection and use of data on ethnicity and race by Federal agencies." [692] The OMB standards provide the following minimum categories for data on ethnicity and race: Two minimum ethnicity categories (Hispanic or Latino; Not Hispanic or Latino) and five minimum race categories (American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White). The aggregate categories for ethnicity and race in Regulation C, which the Bureau proposed to use in the section 1071 final rule, conform to the OMB standards.

The Bureau also explained that in addition to the minimum data categories for ethnicity and race, the OMB's standards provide additional key principles. First, self-identification is the preferred means of obtaining information about an individual's ethnicity and race, except in instances where observer identification is more practical.[693] Second, the collection of greater detail is encouraged as long as any collection that uses more detail is organized in such a way that the additional detail can be aggregated into the minimum aggregate categories for data on ethnicity and race. More detailed reporting, which can be aggregated to the minimum categories, may be used at the agencies' discretion. Lastly, Federal agencies must produce as much detailed information on ethnicity and race as possible; however, Federal agencies shall not present data on detailed categories if doing so would compromise data quality or confidentiality standards.[694]

The Bureau noted that although OMB received comments requesting the creation of a separate Arab or Middle Eastern ethnicity category prior to the adoption of the OMB Federal Data Standards on Race and Ethnicity in 1997, OMB accepted the Interagency Committee's recommendation not to include one in the 1997 minimum standards for reporting of Federal data on race and ethnicity. OMB stated that while it was adopting the Interagency Committee's recommendation, it believed additional research was needed to determine the best way to improve data on this population group.[695]

The Bureau further explained that in 2017, OMB requested comment on the Federal Interagency Working Group for Research on Race and Ethnicity's (Working Group's) proposals to update the OMB Federal Data Standards on Race and Ethnicity.[696] The Working Group proposed adding a Middle Eastern or North African classification to the Federal Data Standards on Race and Ethnicity and to issue specific guidelines for the collection of detailed data for American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or Other Pacific Islander, and White groups.[697] The Working Group also considered whether race and ethnicity should be collected using separate questions versus a combined question. The OMB Federal Data Standards on Race and Ethnicity have not been updated, however, in the time since OMB's 2017 request for comment.

The Bureau stated its belief that it is also important to consider the data standards that the U.S. Census Bureau (Census Bureau) uses in the Decennial Census. The definition of Hispanic or Latino origin used in the 2010 and 2020 Census questionnaire refers to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.[698] The 2010 and 2020 Census disaggregated the Hispanic or Latino ethnicity into four categories (Mexican, Mexican American, or Chicano; Puerto Rican; Cuban; and Another Hispanic, Latino or Spanish origin) and included an area where respondents could provide (*i.e.,* write in) a specific Hispanic, Latino, or Spanish origin group as additional information.[699]

The Bureau explained that the 2010 and 2020 Census questionnaires listed three of OMB's five aggregate race categories (American Indian or Alaska Native; Black or African American; and White). Although the questionnaires do not list the aggregate race categories for Asian or for Native Hawaiian or Other Pacific Islander, they do list the related disaggregated subcategories for the Asian race category (*i.e.,* Asian Indian, Chinese, Filipino, Japanese, Korean, Vietnamese, Other Asian), and for the Native Hawaiian and Other Pacific Islander race category (*i.e.,* Native Hawaiian, Chamorro,[700] Samoan, Other Pacific Islander). These questionnaires also included three areas where respondents could write in a specific race: a specific Other Asian race, a specific Other Pacific Islander race, or the name of an enrolled or principal tribe in the American Indian or Alaska Native category.[701] Additionally, the 2020 Census allowed respondents to write in a specific origin for the White category and for the Black or African American category. For respondents who did not identify with any of the five minimum OMB race categories, the Census Bureau included a sixth race category—Some Other Race—on the 2010 and 2020 Census questionnaires. Respondents could also select one or more race categories and write-in options.[702]

The Bureau noted that on February 28, 2017, the Census Bureau released its *2015 National Content Test: Race and Ethnicity Analysis Report.* This National Content Test provided the U.S. Census Bureau with empirical research to contribute to the planning for the content of the 2020 Census' race/ethnicity questions. The report presented findings to the Census Bureau Director and executive staff on research conducted to assess optimal design elements that could be used in question(s) on race and ethnicity. It noted that Americans view "race" and "ethnicity" differently than in decades past and that a growing number of people find the current race and ethnicity categories confusing, or they wish to see their own specific group reflected on the Census questionnaire. The National Content Test's research found that there have been a growing number of people who do not identify with any of the official OMB race categories, and that an increasing number of respondents have been racially classified as "Some Other

[691] Off. of Mgmt. & Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity,* 62 FR 58782, 58782–90 (Oct. 30, 1997) (OMB Federal Data Standards on Race and Ethnicity).

[692] *See id.*

[693] *See id.*

[694] *See id.*

[695] *Id.* at 58782.

[696] 82 FR 12242 (Mar. 1, 2017).

[697] *See* OMB Federal Data Standards on Race and Ethnicity.

[698] *See* U.S. Census Bureau, *2010 Official Questionnaire, https://www.census.gov/history/pdf/2010questionnaire.pdf* (2010 Census Official Questionnaire), and U.S. Census Bureau, *2020 Official Questionnaire, https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire.pdf* (2020 Census Official Questionnaire).

[699] *See* 2010 Census Official Questionnaire and 2020 Census Official Questionnaire.

[700] The questionnaire for the 2010 Census included "Guamanian or Chamorro," but the questionnaire for the 2020 Census included only "Chamorro."

[701] *See* 2010 Census Official Questionnaire and 2020 Census Official Questionnaire.

[702] *See id.*

Race.'' This was primarily because of reporting by Hispanics who did not identify with any of the OMB race categories, but it also noted that segments of other populations, such as Afro-Caribbean and Middle Eastern or North African populations, did not identify with any of the OMB race categories.[703] The 2015 National Content Test: Race and Ethnicity Analysis Report concluded that optimal design elements that may increase reporting, decrease item non-response, and improve data accuracy and reliability include: (1) a combined race and ethnicity question with detailed checkbox options; (2) a separate ''Middle Eastern or North African'' response category; and (3) instructions to ''Mark all that apply'' or ''Select all that apply'' (instead of ''Mark [X] one or more boxes'').[704]

The Census Bureau did not ultimately incorporate these design elements into the questionnaire for the 2020 Decennial Census, but instead continued to ask about ethnicity and race in two separate questions. While the questionnaire did not provide detailed check box options for the White race category or for the Black or African American race category, the questionnaire did add write-in options and noted examples. For White, it noted examples of German, Irish, English, Italian, Lebanese, and Egyptian. For Black or African American, it noted examples of African American, Jamaican, Haitian, Nigerian, Ethiopian, and Somali.[705] Notwithstanding the approach used by the Census Bureau for the 2020 Decennial Census, the Bureau requested comment on whether the approach and design elements set forth in the *2015 National Content Test: Race and Ethnicity Report Analysis* (whether in whole or in part) would improve data collection that otherwise furthers section 1071's purposes, improve self-identification of race and ethnicity by applicants and response rates, or impose burdens on financial institutions collecting and reporting this information.

The Bureau proposed that financial institutions must permit applicants to provide a principal owner's ethnicity and race using the aggregate categories used for HMDA data collection, which conform to the OMB standards. The Bureau believed that aligning the aggregate ethnicity and race categories for this rule's data collection with the HMDA data collection would promote consistency and could reduce potential confusion for applicants, financial institutions, and other users of the data.

The Bureau also proposed that applicants must be permitted to provide a principal owner's ethnicity and race using the disaggregated subcategories used in HMDA data collection, which also conform to one of the key principles in the OMB standards: encouraging the collection of greater detail as long as any collection that uses more detail is organized in such a way that the additional detail can be aggregated into the minimum aggregate categories for data on ethnicity and race. With respect to ethnicity data collection, the Bureau proposed that applicants must be permitted to provide a principal owner's ethnicity using the disaggregated subcategories used in HMDA data collection. For race data collection, the Bureau proposed that applicants must be permitted to provide a principal owner's race using the disaggregated subcategories for the Asian race category and the Native Hawaiian or Other Pacific Islander race category. The Bureau also proposed that applicants must be permitted to provide a principal owner's race using disaggregated subcategories for the Black or African American race category, which is not currently used in HMDA data collection. Lastly, similar to HMDA, the Bureau proposed inviting an applicant to provide the name of a principal or enrolled tribe for each principal owner with respect to the American Indian or Alaska Native race category.

The Bureau explained that it was proposing use of disaggregated subcategories for this rulemaking, in part, for general consistency with existing HMDA reporting requirements. Further, collection and reporting using disaggregated subcategories could be beneficial when attempting to identify potential discrimination or business and community development needs in particular communities. While disaggregated data may not be useful in analyzing potential discrimination where financial institutions do not have a sufficient number of applicants or borrowers within particular subgroups to permit reliable assessments of whether unlawful discrimination may have occurred, disaggregated data on ethnicity and race may help identify potentially discriminatory lending patterns in situations in which the numbers are sufficient to permit such fair lending assessments. The Bureau noted that additionally, as suggested in the 2015 National Content Test: Race and Ethnicity Report Analysis, the use of disaggregated subcategories may increase response rates.

The Bureau acknowledged, however, that including the disaggregated subcategories for four principal owners may make data collection more difficult in certain situations, such as for applications taken solely by telephone or for paper applications taken at retail locations. Given these concerns, the Bureau sought comment on whether an accommodation should be made for certain application scenarios, for example by permitting financial institutions to collect ethnicity and race information using only the aggregate categories or to permit financial institutions to collect ethnicity, race, and sex information on only one principal owner in those scenarios. The Bureau also noted that FinCEN's customer due diligence rule excludes from certain of its requirements point-of-sale transactions for the purchase of retail goods or services up to a limit of $50,000.[706] The Bureau did not propose this approach given the different purposes and requirements of the customer due diligence rule (as well as FinCEN's related customer identification program rule)[707] and section 1071. Nonetheless, the Bureau sought comment on whether covered applications taken at retail locations, such as credit cards and lines of credit with a credit limit under a specified amount (such as $50,000), should be excepted from some or all of the requirement to obtain principal owners' ethnicity, race, and sex information.

The Bureau also sought comment on its proposed use of the HMDA aggregate categories, the HMDA disaggregated subcategories (including the ability to provide additional information if an applicant indicates that a principal owner is Other Hispanic or Latino, Other Asian, or Other Pacific Islander), and the proposed addition of

[703] U.S. Census Bureau, *2015 National Content Test: Race and Ethnicity Analysis Report, Executive Summary*, at ix (Feb. 28, 2017), *https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf*.

[704] *Id.* at 83–85.

[705] *See* 2020 Census Official Questionnaire.

[706] 31 CFR 1010.230(h)(1)(i). The customer due diligence rule's exclusion for certain point of sale transactions is based on the ''very low risk posed by opening such accounts at [a] brick and mortar store.'' Fin. Crimes Enf't Network, U.S. Dep't of Treas., *Guidance: Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions,* at Q 29 (Apr. 3, 2018), *https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf*.

[707] FinCEN's customer identification program rule does not contain a point of sale exclusion. While the rule permits *verification* of customer identity information within a reasonable time after an account is opened, the *collection* of required customer information must occur prior to account opening. *See* 31 CFR 1020.220(a)(2)(i)(A) and (ii). For credit card accounts, a bank may obtain identifying information about a customer from a third-party source prior to extending credit to the customer. 31 CFR 1020.220(a)(2)(i)(C).

disaggregated subcategories for the Black or African American category. Additionally, the Bureau sought comment regarding whether it would be helpful or appropriate to provide additional clarification or to pursue a different approach regarding the ability of a principal owner to identify as Other Hispanic or Latino, Other Asian, or Other Pacific Islander or to provide additional information if a principal owner is Other Hispanic or Latino, Other Asian, or Other Pacific Islander. The Bureau also sought comment on whether any additional or different categories or subcategories should be used for section 1071 data collection, and whether the collection and reporting of ethnicity and race should be combined into a single question for purposes of section 1071 data collection and reporting. The Bureau further sought comment on whether an additional category for Middle Eastern or North African should be added and, if so, how this category should be included and defined. In addition, the Bureau sought comment on whether disaggregated subcategories should be added for the aggregate White category, and if so, what disaggregated subcategories should be added and whether the applicant should be permitted to write in or otherwise provide other disaggregated subcategories or additional information. The Bureau also sought comment on whether the approach and design elements set forth in the 2015 National Content Test: Race and Ethnicity Report Analysis would improve data collection or otherwise further section 1071's purposes, as well as whether it would pose any particular burdens or challenges for financial institutions collecting and reporting this information. Finally, the Bureau sought comment on whether, similar to data collection pursuant to Regulation C, financial institutions should be limited to reporting a specified number of aggregate categories and disaggregated subcategories and, if so, whether such a limitation should be described in the sample data collection form.

Proposed comments 107(a)(20)–6 and –7 would have provided guidance on collecting and reporting ethnicity and race information, respectively. The proposed comments would have explained that applicants must be permitted to provide a principal owner's ethnicity or race using aggregate categories and disaggregated subcategories and would have also listed the aggregate categories and disaggregated subcategories that applicants must be permitted to use. The proposed comments would have also explained that applicants must be permitted to select one, both, or none of the aggregate categories and as many disaggregated subcategories as the applicant chooses, even if the applicant does not select the corresponding aggregate category. The proposed comments would have stated that, if an applicant provides ethnicity or race information for a principal owner, the financial institution reports all of the aggregate categories and disaggregated subcategories provided by the applicant, and the proposed comments would have provided examples. The proposed comments would have stated that a financial institution must also permit the applicant to refuse to provide ethnicity or race information for one or more principal owners and explain how a financial institution reports ethnicity or race information if an applicant declines to provide the information or fails to respond. Finally, the proposed comments would have explained how a financial institution reports ethnicity or race information if an applicant has fewer than four principal owners, and they would have provided examples.

Comments Received—Collecting Ethnicity and Race Using Aggregate Categories and Disaggregated Subcategories

The Bureau received comments from a range of commenters, including lenders, trade associations, community groups, and a business advocacy group, on its proposal to collect ethnicity and race using aggregate categories and disaggregated subcategories.

Several banks and a group of trade associations opposed the proposal to collect ethnicity and race information using disaggregated subcategories. Specifically, these commenters asserted that the disaggregated subcategories do not add value to fair lending reviews or findings in the HMDA context because there is not enough disaggregated subcategory data from which to draw fair lending conclusions, as mortgage applicants do not often use the disaggregated subcategories. Thus, they said, disaggregated subcategories should not be adopted for this data collection. The group of trade associations also stated that the Bureau's analysis of 2018 HMDA data shows that mortgage applicants largely selected one ethnicity or race field and asserted that the Bureau has not shown that small business credit applicants are likely to behave differently. A small business owner also objected to the Bureau's proposal on the grounds that applicants would not report the ethnicity and race of their principal owners accurately and, if faced with a long list of categories, would choose not to report. This commenter also asserted that the Bureau's proposal does not align with other government data collections and would hinder data analysis.

Two of those banks and the group of trade associations also objected on the grounds that collecting disaggregated data in the HMDA context has been burdensome and frustrating for applicants and lenders. The trade associations also argued that including disaggregated subcategories would impose more burden than under Regulation C because ethnicity and race data would need to be collected for up to four principal owners under the Bureau's proposal, whereas it would generally be collected for only one or two applicants for the HMDA data collection. This commenter also emphasized that for ethnicity and race data collection under Regulation C, financial institutions are required to read aloud all of the ethnicity and race disaggregated subcategories when taking a mortgage application over the phone, which the commenter asserted has been frustrating for mortgage applicants and would likely be frustrating for small business applicants as well.

The group of trade associations and a bank further argued for use of only the aggregate categories currently used in Regulation C and the OMB Federal Data Standards on Race and Ethnicity, without any new aggregate or disaggregated categories. As discussed above regarding general comments about the Bureau's proposal for collecting ethnicity, race, and sex, the Bureau also received some comments requesting that demographic information collection generally (including on race and ethnicity) for this rule should be the same, or similar to the greatest extent possible, as for Regulation C.

In contrast, many community groups and a minority business advocacy group, as well as some industry commenters, generally supported collecting ethnicity and race using aggregate categories and disaggregated subcategories as proposed by the Bureau. These commenters stated that collecting detailed, disaggregated ethnicity and race data on small business applicants' owners, and particularly for those of color, will over time provide transparency as to the different experiences of racial and ethnic subgroups in the small business lending marketplace, further fair lending enforcement, and support the objectives of section 1071. Several commenters emphasized that disaggregated data will help capture potential discrimination and allow for targeted support. One stated that the proposal will add nuance to fair lending assessments and that aggregate racial and ethnic categories mask economic disparities and differences in social capital and experiences.

Many of these commenters highlighted that HMDA data has revealed that racial and ethnic subgroups have different experiences in the home buying market. These commenters argued that, similarly, disaggregated ethnicity and race data are necessary to allow assessments in the small business lending marketplace. Several of these commenters specifically noted that research based on 2019 HMDA data shows that Asian American and Pacific Islander communities and Hispanic/Latino subgroups fare differently in the mortgage market. One commenter noted, as an example of different experiences, that participants in its homebuying seminars have stated that language barriers often create difficulties in the home buying process. Other commenters noted the importance of disaggregated data for business lending specifically, generally citing findings in the Federal Reserve Banks' *Small Business Credit Survey: 2021 Report on Employer Firms* that firms owned by people of color were less likely to receive the full of amount financing sought than white-owned businesses.

Some commenters stated that they supported the Bureau's proposed approach of generally aligning with HMDA's aggregate categories and disaggregated subcategories for ethnicity and race and also adding new disaggregated subcategories. Two commenters affirmed that the HMDA ethnicity and race categories and subcategories are also relevant for small business lending. A lender commented that this approach will reveal different experiences in the small business lending market, but also provide familiar reporting standards. Another lender stated that aligning many of the ethnicity and race categories with those for HMDA would promote consistency and reduce confusion. One community group stated that based on the HMDA experience, it anticipates that applicants will not have difficulty understanding the information being requested regarding race as long as the sample form is clear for both lenders and applicants to follow.

Many commenters also supported the specific ethnicity and race aggregate categories and disaggregated subcategories proposed. Some called out their support for particular groups of disaggregated subcategories, for example for the Hispanic/Latino population, Asian, and Native Hawaiian or Other Pacific Islander aggregate categories. Some commenters noted that none of these communities are monoliths and different subgroups have different experiences in seeking credit. One commenter made a similar statement regarding African American and African immigrant communities in the residential mortgage context.

A community group operating in New York City suggested adding certain subgroups listed as examples in the Other Latino or Hispanic disaggregated ethnicity subcategory and in the Other Asian disaggregated race subcategory. The community group suggested adding an ethnicity subcategory for Dominican, because in New York City Dominicans make up a larger percentage of the population than Puerto Ricans, one of the proposed disaggregated ethnicity subcategories. The commenter also suggested adding Colombian, Ecuadorian, and Honduran disaggregated ethnicity subcategories. This commenter further suggested adding Bangladeshi and Pakistani disaggregated race subcategories, under the Asian aggregate race category, stating that these populations make up 6 percent and 8 percent, respectively, of the Asian population in New York City.

Many commenters expressed specific support for the proposed disaggregated Black or African American race subcategories. One commenter stated that there are distinct differences in the experiences and treatment of different subgroups and that many of these subgroups have tight-knit communities and thus it is important that this data collection captures such nuances, and another stated that disaggregation generally has proven to have value in the HMDA context.

Regarding the American Indian or Alaska Native aggregate race category, several commenters supported the Bureau's proposal to include a write-in text field for an applicant to name a principal owner's enrolled or principal tribe, though some also were concerned that there would be insufficient information on indigenous small business owners as a result of small sample sizes, which could mask the credit needs of that community.

Some commenters supported adding an additional category for Middle Eastern or North African in the final rule, in response to the Bureau's request for comment. One commenter stated that individuals of Middle Eastern or North African descent are often left with little choice but to select White as their race, despite a long history of discrimination in the United States, and that adding this category would meet the spirit of section 1071. Several other commenters stated that a Middle Eastern or North African category should be added to capture discrimination against and barriers for applicants of Middle Eastern or North African descent. A couple of commenters suggested that North African and Middle Eastern could be addressed as its own category or as disaggregated subcategories. However, a group of trade associations argued against the proposal for a Middle Eastern or North African category, noting that OMB never finalized its proposal to include such a category in its Federal standards on race and ethnicity.

Regarding disaggregated ethnicity and race categories generally, a joint letter from community groups and business advocacy groups suggested that the Bureau provide in the final rule that the ethnicity and race categories will be maintained and updated in alignment with OMB's standards and that the specifications will be adjusted in filing instructions that the Bureau issues from time to time.

Several commenters responded to the Bureau's request for comment on whether to combine the proposed questions about ethnicity and race. These commenters did not support combining the questions. A group trade associations noted that while the Census Bureau's *2015 National Content Test: Race and Ethnicity Report Analysis* showed that many individuals that select Hispanic or Latino as their ethnicity do not make any race selections because they do not identify with the aggregate race categories, the race and ethnicity questions were ultimately not combined for 2020 Decennial Census. The commenter also reiterated that the questions are separate for HMDA data collection purposes, and stated that the same approach should be used for this rule to maintain consistency across data collection rules and with the Census Bureau's approach, reduce burden for financial institutions, and facilitate data analyses.

One commenter urged the Bureau to allow applicants to provide an additional disaggregated subcategory in addition to those specified in the proposal beside ''other'' in a text field in the same manner that American Indian or Alaska Natives can identify tribal affiliation. The commenter stated this would allow applicants to write in responses such as Nicaraguan or Hmong that may provide important additional information for fair lending enforcement.

A bank asserted that for the ethnicity and race data collection under Regulation C, when applicants select a disaggregated ethnicity or race subcategory, the selection prevents the applications from being associated with the corresponding aggregate category. The commenter stated that this issue impacts how some lenders' application and origination performance with specific communities appears and urged the Bureau to fix the issue in the Regulation C data collection and ensure it is not replicated for the section 1071 data collection.

Final Rule—Collecting Ethnicity and Race Using Aggregate Categories and Disaggregated Subcategories

For the reasons set forth herein, the Bureau is finalizing its proposal to collect information about the ethnicity and race of principal owners using aggregate categories and disaggregated subcategories generally as proposed. However, the Bureau has revised the commentary related to the collection of ethnicity and race data to reduce repetition among the appendices and the commentary and to reflect other changes, as explained below.

The Bureau agrees with commenters that the disaggregated ethnicity and race subcategories will provide meaningful data that will further section 1071's purposes. Such data will be beneficial in identifying potential discrimination or business and community development needs in particular communities, including by providing insight into variations in borrowing experiences by ethnicity and race across the small business lending marketplace, even if not all applicants make ethnicity or race disaggregated subcategory selections. For example, in the HMDA context, the Bureau has used disaggregated race data collected under Regulation C to find that some Asian American and Pacific Islanders subgroups fare better than others in the mortgage market.[708] Other data users have been able to draw conclusions and make policy recommendations to address differences and disparities in home lending among subgroups in the Hispanic or Latino community using disaggregated HMDA subcategories.[709] The Bureau believes that disaggregated ethnicity and race data in the section 1071 data collection will similarly advance section 1071's purpose in enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of businesses with owners that are members of ethnic and racial subgroups, regardless of whether those businesses meet the definition of a minority-owned small business.

With respect to the fair lending enforcement purpose of section 1071, the Bureau recognizes that disaggregated data may not be useful in analyzing potential discrimination where financial institutions do not have a sufficient number of applicants or borrowers within particular subgroups to permit reliable assessments of whether unlawful discrimination may have occurred. However, the Bureau believes there will be—as has proven to be the case in the HMDA data—situations in which the numbers are sufficient to permit such fair lending assessments. The Bureau also believes that the use of disaggregated subcategories may increase ethnicity and race response rates by small business applicants. Requiring the collection of disaggregated race and ethnicity data also follows a key principle set forth in the OMB Federal Data Standards on Race and Ethnicity to encourage applicants to self-identify their principal owners' race and ethnicity, by providing more inclusive options for applicant self-reporting.[710]

The Bureau is not, at this time, adding additional disaggregated ethnicity and race subcategories beyond those set forth in the NPRM. While one commenter suggested adding a few disaggregated ethnicity and race categories, such suggestions were based on the demographics of a specific city and it is unclear whether they would provide useful data in a nationwide data collection. The Bureau notes that if an applicant's principal owner does not clearly identify with any of the listed disaggregated ethnicity or race subcategories associated with a specific aggregate ethnicity or race category, many of the aggregate ethnicity and race categories have an associated "Other" disaggregated subcategory (*e.g.,* "Other Hispanic or Latino," "Other Asian," "Other Black or African American," and "Other Pacific Islander") that give the applicant opportunities to provide a specific subcategory not listed or otherwise provide additional ethnicity or race information.[711]

The Bureau also is not adding a separate, disaggregated subcategory for applicants to write in ethnicity or race information, as suggested by a commenter. The Bureau recognizes that some applicants may not clearly identify with the Bureau's designated ethnicity and race aggregate categories and disaggregated subcategories, despite the "Other" disaggregated ethnicity and race subcategories associated with the aggregate ethnicity and race categories in the final rule. The Bureau also notes that the 2020 Decennial Census and the Census Bureau's American Community Survey include a separate "Some Other Race" category, which provided respondents with the ability to write in additional information.[712] However, the Census Bureau's use of this race category is statutorily required and the best practice for Federal agencies is to not include a "Some Other Race" category unless required by law.[713] The Bureau believes it is important that the race and ethnicity information be capable of being aggregated to or associated with the five OMB aggregate categories for race and the two aggregate categories for ethnicity in the OMB Federal Data Standards on Race and Ethnicity to facilitate the Bureau's and others' ability to analyze and use the collected data. As noted above, applicants will be able to use the associated "Other" disaggregated subcategories associated with many of the aggregate race and ethnicity categories to provide their principal owners' information and, as clarified by final comments 107(a)(19)–13 and –14, will also be able to make multiple selections for their principal owners' race and/or ethnicity to accurately reflect their racial and ethnic identities.

The Bureau likewise is not combining the questions about ethnicity and race at this point in time. Commenters generally did not support or did not state a position on combining the ethnicity and race questions. The Bureau notes that the 2020 Decennial

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[708] Bureau of Consumer Fin. Prot., *Data Point: Asian American and Pacific Islanders in the Mortgage Market* (July 2021), *https://files.consumerfinance.gov/f/documents/cfpb_aapi-mortgage-market_report_2021-07.pdf.*

[709] *See* Agatha So *et al.,* Nat'l Cmty. Reinvestment Coal., *Hispanic Mortgage Lending: 2019 HMDA Analysis* (2019), *https://www.ncrc.org/hispanic-mortgage-lending-2019-analysis/.*

[710] *See* 62 FR 58782, 58789 (Oct. 30, 1997).

[711] The exceptions are the "American Indian or Alaska Native" aggregate race category, which provides applicants with an opportunity to write in or provide additional information about their principal owner's enrolled or principal tribe, the "Not Hispanic or Latino" aggregate ethnicity category, and the "White" aggregate race category.

[712] *See* 2020 Census Official Questionnaire; 2022 American Community Survey Questionnaire.

[713] *See* Chief Statistician of the U.S., *Flexibilities and Best Practices for Implementing the Office of Management and Budget's 1997 Standards for Maintaining, Collecting, And Presenting Federal Data on Race and Ethnicity (Statistical Policy Directive No. 15),* n.32 (July 2022) (citing the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Public Law 109–108, tit. II, 119 Stat. 2289, 2308–09 (2005)), *https://www.whitehouse.gov/wp-content/uploads/2022/07/Flexibilities-and-Best-Practices-Under-SPD-15.pdf; id.* at 8–9.

Census and the 2022 American Community Survey also do not combine the questions.[714]

Some commenters expressed concern that the Bureau's proposal for the American Indian or Alaska Native aggregate race category, which does not have specifically listed disaggregated subcategories but permits applicants to write in the name of a principal owner's enrolled or principal tribe, would lead to small sample sizes and thus insufficient information to make assessments about indigenous small business owners and those communities. At this time, the Bureau is not making any changes to its approach for the American Indian or Alaska Native aggregate race category. The Bureau notes that the Census Bureau's 2020 Decennial Census and 2022 American Community Survey similarly listed American Indian or Alaska Native as an aggregate race category, do not list specific disaggregated subcategories, and ask respondents to "Print [the] name of enrolled or principal tribe(s)" along with suggested write-in options.[715] As explained in the 2015 National Content Test: Race and Ethnicity Race Report Analysis, there are hundreds of American Indian and Alaska Native tribes, villages, and groups, and checkboxes for the largest groups would only represent a small percentage of the American Indian and Alaska Native population.[716] Given this research, the Bureau believes that its approach to the American Indian or Alaska Native aggregate race category is appropriate and is thus not including a list of suggested write-in examples at this time.

The Bureau has also decided against specifically collecting data on Middle Eastern or North African populations at this point in time, whether as an aggregate ethnicity or race category, a disaggregated ethnicity or race subcategory, or through some other inquiry, due to uncertainty about how a Middle Eastern or North African category should be defined. As detailed in the NPRM, the Census Bureau and OMB have considered, over the course of years, whether to include a separate Arab or North African, or alternatively Middle Eastern or North African, classification in the Decennial Census and the Federal Data Standards on Race and Ethnicity.[717] But, despite a 2017 recommendation by a Federal interagency working group to add such a classification to the OMB Federal Data Standards on Race and Ethnicity, the standards have not been updated. And, although it was recommended in the 2015 National Content Test: Race and Ethnicity Report Analysis that a separate Middle Eastern or North African classification be adopted for the 2020 Decennial Census, no Middle Eastern or North African classification was included due to questions about whether the information should be collected as an ethnicity or race category.[718] Given the unsettled nature of how to best collect information about Middle Eastern and North African populations, the Bureau is not including a separate classification for Middle Eastern or North African at this point in time. The Bureau notes, however, that OMB is currently in the process of reviewing and revising the standards for collecting data on race and ethnicity for the Federal government and may revise the standards by the summer of 2024.[719] The Bureau will be reviewing OMB's efforts and other developments that may arise in the area of ethnicity and race data collection and measurement.

The Bureau is not committing at this time to updating the rule's ethnicity and race aggregate categories and disaggregated subcategories to align with future changes to OMB Federal Data Standards on Race and Ethnicity. First, the data points the Bureau is finalizing under § 1002.107(a)(18) and (19), regarding minority-owned business status and the ethnicity and race of principal owners, are statutorily mandated. Second, the Bureau notes that the OMB Federal Data Standards on Race and Ethnicity establish only minimum standards for the collection of race and ethnicity information, which the data collection under Regulation C already expands upon.[720] Third, it is unknown what the changes to the Federal standards will be and whether the collection of information based on any revised race and ethnicity aggregate categories and/or disaggregated subcategories would further the purposes of section 1071. The Bureau, however, will track forthcoming developments as to the Federal government's standards for the collection of race and ethnicity information. Regarding updates to data point response options, see final comment 107(a)–4.

As supported by some commenters, the Bureau believes it is important to collect information about principal owners that identify with subgroups within the Black or African American community, particularly as the Black or African American community in the United States diversifies. The Bureau does not believe it is necessary to use the exact same aggregate categories and disaggregated subcategories for ethnicity and race as are used for data collection under Regulation C (which would preclude the Black or African American race disaggregated subcategories), as suggested by some commenters. Certainly, the Bureau's experience with ethnicity and race data collection under HMDA informed the Bureau's considerations for its proposals and for this final rule. However, although the collection of ethnicity, race, and sex data in both contexts serves related fair lending purposes, Regulation C and this final rule are authorized under different statutes and for different markets. The Bureau believes that the added Black or African American race disaggregated subcategories it proposed and is finalizing will provide additional

[714] The 2020 Decennial Census and the 2022 American Community Survey both ask separate questions for Hispanic, Latino, or Spanish origin, and for race. *See* 2020 Census Official Questionnaire; U.S. Census Bureau, *2022 American Community Survey Questionnaire, https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2022/quest22.pdf.*

[715] *See* 2020 Census Official Questionnaire; U.S. Census Bureau, 2022 American Community Survey Questionnaire.

[716] 2015 National Content Test: Race and Ethnicity Report Analysis, at 52 ("[W]e know from Census Bureau research that there are hundreds of very small detailed [American Indian and Alaska Native] tribes, villages, and indigenous groups for which Census Bureau data is collected and tabulated, and if we were to employ the six largest American Indian groups and Alaska Native groups as checkboxes, they would represent only about 10 percent of the entire AIAN population.").

[717] 62 FR 58782 (Oct. 30, 1997); 82 FR 12242 (Mar. 1, 2017).

[718] Hansi Lo Wang, *No Middle Eastern or North African Category on the 2020 Census, Bureau Says,* Nat'l Pub. Radio (Jan. 29, 2018), *https://www.npr.org/2018/01/29/581541111/no-middle-eastern-or-north-african-category-on-2020-census-bureau-says. See also* U.S. Census Bureau, 2015 NCT, at xiii, 84–85.

The Bureau notes that after the NPRM was published, the U.S. Department of the Treasury published an interim final rule in March 2022 related to data collection for its State Small Business Credit Initiative (SSBCI) program, which establishes that recipients of SSBCI funding must maintain and submit information about small business program beneficiaries' principal owners' Middle Eastern or North African ancestry, through a separate ancestry question. U.S. Dep't of Treas., *State Small Business Credit Initiative; Demographics-Related Reporting Requirements,* 87 FR 13628 (Mar. 10, 2022).

[719] Off. of Mgmt. & Budget, *Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards,* 88 FR 5375 (Jan. 27, 2023). Proposals and questions for which OMB is soliciting comment include collecting race and ethnicity information using one combined question, adding a Middle Eastern or North African minimum reporting category, requiring the collection of detailed race and ethnicity categories by default, and certain updates to terminology, among others.

[720] As explained by the Bureau in 2015, the race and ethnicity disaggregated subcategories under Regulation C go beyond the minimum categories set forth in the OMB Federal Data Standards on Race and Ethnicity by adding subpopulations used in the 2000 and 2010 Decennial Census. *See* 80 FR 66128, 66190 (Oct. 28, 2015).

information that will further the purposes of section 1071, as explained below.

According to a Pew Research Center report, while 4.6 million, or one in ten, Black individuals in the United States were born in a different country in 2019, it is projected that by 2060 the number will increase to 9.5 million, or more than double the current level.[721] Within this changing demographic, there are socio-economic differences between Black immigrant-headed households and other immigrant households in the United States, between Black immigrant-headed households and U.S.-born Black American headed-households, and among Black immigrant-headed households by region of origin. For example, the report found that in 2019, poverty rates within the Black immigrant population vary by region, with fewer than one-in-five African-born (16 percent) and Central American- or Mexican-born Black immigrants (16 percent) living below the poverty line, and 11 percent and 12 percent of Caribbean- and South American-born Black immigrants, respectively.[722] The Bureau is not collecting immigrant status as part of the section 1071 data collection. However, this research indicates to the Bureau that there could be important distinctions between subgroups of the Black or African American communities in the small business lending marketplace. The Bureau believes that the collection of information about small businesses whose principal owners identify among the Black or African American subgroups will allow it and others to better understand if there are distinct differences in patterns in lending to small businesses with owners in these subgroups and help fulfill the fair lending enforcement and business and community development purposes of section 1071.

Based on its experience with Regulation C, the Bureau believes that after some initial burden to implement the ethnicity and race reporting requirements, there should be minimal ongoing burden for financial institutions related to the collection and reporting of applicants' self-provided responses regarding their principal owners' aggregate category and disaggregated subcategory ethnicity and race selections. However, the Bureau acknowledges the concern raised by one commenter that, unlike in mortgage transactions where generally there are only up to two applicants, under the Bureau's proposal, ethnicity and race information could be collected for up to four principal owners. The commenter generally noted that because of this potential for an applicant to have up to four principal owners, for applications taken over the phone, it could be frustrating for applicants and financial institution employees and officers to read all of the ethnicity and race aggregate categories and disaggregated subcategories out loud, as is currently the practice under Regulation C. In consideration of this issue, the Bureau has added a comment to provide clarification for collecting ethnicity and race information orally, such as over the phone. Final comment 107(a)(19)–16 generally clarifies that when collecting ethnicity and race information orally, the financial institution is not required to read aloud every disaggregated ethnicity and race subcategory. Instead, a financial institution will be able to orally present the lists of aggregate ethnicity and race categories, followed by the disaggregated subcategories (if any) associated with the specific aggregate ethnicity or race categories selected or requested to be heard by the applicant. Comment 107(a)(19)–16 will also clarify, among other things, that after the applicant has made its selection(s) (if any), the financial institution must also ask if the applicant wishes to hear any other lists of disaggregated subcategories. The comment also provides that the financial institution may not present the applicant with the option to decline to provide ethnicity or race information without also presenting the applicant with the specified ethnicity or race aggregate categories and disaggregated subcategories. Comment 107(a)(19)–16 also generally provides that if an applicant has more than one principal owner, a financial institution will have the flexibility to ask for the principal owners' ethnicity and race information in a way that reduces repetition.

With regard to one commenter's request that the Bureau ensure that an applicant's selection of a disaggregated ethnicity or race subcategory does not prevent the application from being associated with the corresponding aggregate ethnicity or race category, the Bureau does not anticipate that the commenter's concern will be an issue for the 1071 data collection. The Bureau also notes that the commenter's issue is not present for reporting under Regulation C, as stated by the commenter. When reporting an applicant's disaggregated ethnicity or race subcategory selections under Regulation C, the aggregate ethnicity or race category is disclosed in the derived aggregate ethnicity or race field in the publicly released data. To the extent the commenter is referring to a concern about how an applicant may select a disaggregated ethnicity or race subcategory, without also selecting the associated aggregate category, the Bureau believes that allowing applicants to make such a selection and requiring a financial institution to report that selection as it was made, and recognizes that individuals may have varying racial and ethnic identities.

To further this goal, final comment 107(a)(19)–1 states that financial institutions report responses as provided by applicants. Generally, this is the case even if they contain obvious discrepancies and inaccuracies.[723] Upon further review, however, the Bureau has revised the commentary for final § 1002.107(a)(19) to clarify that if an applicant provides additional ethnicity or race information in a write-in field on a paper or electronic data collection form but does not select (*e.g.,* by a check mark on a paper form) the corresponding "Other" disaggregated subcategory (*e.g.,* "Other Hispanic or Latino," "Other Asian," "Other Black or African American," and "Other Pacific Islander"), the financial institution is permitted, but not required, to report the corresponding "Other" ethnicity or race disaggregated subcategory as well. Similarly, if an applicant provides the name of an enrolled or principal tribe but does not also indicate that the principal owner is American Indian or Alaska Native on a paper or electronic data collection form, the financial institution is permitted, but not required, to report American Indian or Alaska Native as well. This change aligns with the similar instruction regarding such situations in Regulation C.[724]

The Bureau has also made changes to the commentary specifically regarding the collection of ethnicity and race information to incorporate unique content from the instructions for collecting ethnicity and race information in proposed appendix G, which the Bureau is removing from the final rule, as explained earlier in this section-by-section analysis.[725] These changes include updated numbering, added references to the sample data collection form at final appendix E, and further clarification regarding applicability of the instructions when ethnicity and race information is requested on a paper or electronic data collection form, versus orally (*e.g.,* telephone applications). The Bureau has also removed proposed clarification in each of the ethnicity and race-related comments regarding ethnicity and race information that an applicant has specifically indicated it is declining to provide, which it did not provide, or which is not applicable, including because the applicant has fewer than four principal owners.[726] The Bureau has either deleted such content where duplicative of similar content in final comment 107(a)(19)–1 (''General'') or moved it to new, generally applicable comments at final comments 107(a)(19)–6 (''Ethnicity, race, or sex of principal owners not provided by applicant''), 107(a)(19)–7 (''Applicant declines to provide information about a principal owner's ethnicity, race, or sex''), and 107(a)(19)–10 (''Reporting for fewer than four principal owners'').

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[721] Christine Tamir & Monica Anderson, Pew Rsch. Ctr., *One-in-Ten Black People Living in the U.S. Are Immigrants,* at 7 (Jan. 20, 2022), *https://www.pewresearch.org/race-ethnicity/wp-content/uploads/sites/18/2022/01/RE_2022.01.20_Black-Immigrants_FINAL.pdf.*

[722] *See id.* at 28–31.

[723] The Bureau notes that comment 107(a)(19)–8 provides clarification that in the specific situation where an applicant both provides a substantive response to a request for a given principal owner's ethnicity, race, or sex (by identifying the principal owner's race, ethnicity, or sex) and also indicates that it does not wish to provide the information (*e.g.,* by selecting an option that states "I do not wish to provide this information" or similar), the financial institution reports the substantive response provided by the applicant (rather than reporting that the applicant responded that it did not wish to provide the information).

[724] *See, e.g.,* 12 CFR part 1002, appendix B, instruction 9.ii.

Proposed Rule—Collecting Sex

Proposed comment 107(a)(20)–8 would have clarified that a financial institution is required to permit an applicant to provide a principal owner's sex using one or more of the following categories: Male, Female, the applicant prefers to self-describe their sex (with the ability of the applicant to write in or otherwise provide additional information), and also would have permitted the applicant to refuse to provide the information. The sex categories would have also been on the sample data collection form proposed as appendix E, in response to a query about the principal owner's ''Sex,'' with a direction to ''Check one or more.'' Instruction 6 of proposed appendix G would have similarly required financial institutions to permit applicants to use the sex categories as listed on proposed appendix E as responses for a principal owner's sex.

In the NPRM, the Bureau stated that it was generally proposing that financial institutions use the sex categories from Regulation C when requesting that applicants provide the sex information of their principal owners, but that it was also proposing the self-describe response option. The Bureau explained that Federal, State, and local government agencies have been moving to providing additional options for designating sex. At the Federal level, the Bureau noted that, for example, the Department of State had announced that it was planning to offer the option of a new gender marker for non-binary, intersex, and gender non-conforming persons for passports and Consular Reports of Birth Abroad as an alternative to male or female.[727] The Bureau also noted that the Food and Drug Administration includes the gender options of female, male, intersex, transgender, and ''prefer not to disclose'' on certain patient forms.[728] The Bureau also discussed how a number of States and the District of Columbia, as well as some local governments, offer an alternative sex or gender designation to male and female (*e.g.,* ''X'') on government-issued documents and forms such as drivers' licenses and identification cards, and in some cases birth certificates.[729]

The Bureau further explained that the Supreme Court's 2020 opinion in *Bostock* v. *Clayton County* had concluded that sex discrimination encompasses sexual orientation discrimination and gender identity discrimination, and that these forms of discrimination necessarily involve consideration of sex.[730] The Supreme Court reached this conclusion in the context of title VII of the Civil Rights Act of 1964, as amended,[731] which prohibits sex discrimination in employment.[732] Following the issuance of the Supreme Court's opinion, the Bureau issued an interpretive rule clarifying that ECOA's and Regulation B's prohibition on discrimination based on sex protects against discrimination based on sexual orientation, gender identity, actual or perceived nonconformity with sex-based or gender-based stereotypes, and the sex of people associated with the applicant.[733] The Bureau noted that other Federal agencies have similarly clarified that other statutes that protect against discrimination based on sex protect against discrimination based on sexual orientation and gender identity.[734]

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[725] These comments were proposed comments 107(a)(20)–6 and 107(a)(20)–7. These proposed comments generally correspond with final comments 107(a)(19)–13 and 107(a)(20)–14.

[726] The clarification was originally at proposed comments 107(a)(20)–6.iv and –7.iv.

[727] *See* U.S. Dep't of State, *Proposing Changes to the Department's Policies on Gender on U.S. Passports and Consular Reports of Birth Abroad* (June 30, 2021), *https://www.state.gov/proposing-changes-to-the-departments-policies-on-gender-on-u-s-passports-and-consular-reports-of-birth-abroad/.* The Department of State subsequently made this option available in April 2022. *See* U.S. Dep't of State, *X Gender Marker Available on U.S. Passports Starting April 11, 2022* (Mar. 31, 2022), *https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/.*

[728] *See* U.S. Food & Drug Admin., *MedWatch forms FDA 3500 and 3500A* (Sept. 12, 2018) (approved under OMB No. 0910–0291), *https://www.fda.gov/media/76299/download* and *https://www.fda.gov/media/69876/download.*

[729] *See, e.g.,* Cal. S.B. 179, *Gender identity: female, male or nonbinary* (Oct. 16, 2017), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB179*; State of California Dep't of Motor Vehicles, *Driver's License or ID Card Updates, https://www.dmv.ca.gov/portal/driver-licenses-identification-cards/updating-information-on-your-driver-license-or-identification-dl-id-card/* (last visited Mar. 20, 2023); Colo. Dep't of Revenue, *Change of Sex Designation, https://drive.google.com/file/d/1PeYZd7U43ar6Flg8IFAT1Etg1EPdLVUy/view*; State of Connecticut Dep't of Motor Vehicles, *Gender Designation on a License or Identification Card, https://portal.ct.gov/-/media/DMV/20/29/B-385.pdf*; District of Columbia Dep't of Motor Vehicles, *Procedure For Establishing or Changing Gender Designation on a Driver License or Identification Card* (June 13, 2017), *https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/DC%20DMV%20Form%20Gender%20Self-Designation%20English.pdf, DC Driver License or Identification Card Application* (Jan. 2019), *https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/DMV%20BOE%20Application_2-25-19.pdf*; Maine Bureau of Motor Vehicles, *Gender Designation Form* (Nov. 4, 2019), *https://www1.maine.gov/sos/bmv/forms/GENDER%20DESIGNATION%20FORM.pdf*; State of Nevada Dep't of Motor Vehicles, *Name Changes, https://dmvnv.com/namechange.htm*; State of New Jersey Dep't of Health, Off. of Vital Statistics and Registry, *Request Form and Attestation (REG–L2) to Amend Sex Designation to Reflect Gender Identity on a Birth Certificate—Adult* (Feb. 2019), *https://www.nj.gov/health/forms/reg-l2_1.pdf*; 2019 N.J. Sess. Law Serv. ch. 271; New Mexico Motor Vehicle Div., *Request for Sex Designation Change, http://realfile.tax.newmexico.gov/mvd10237.pdf*; New Mexico Dep't of Health, *Request to Change Gender Designation on a Birth Certificate* (Oct. 2019), *https://www.nmhealth.org/publication/view/form/5429/*; Virginia Dep't of Motor Vehicles, *Driver's License and Identification Card Application* (July 1, 2021), *https://www.dmv.virginia.gov/webdoc/pdf/dl1p.pdf*; Washington State Dep't of Licensing, *Change of Gender Designation* (Nov. 2019), *https://www.dol.wa.gov/forms/520043.pdf*; N.Y. City Dep't of Homeless Servs., Off. of Policy, Procedures and Training, *Transgender, Non-binary, and Intersex Clients* (July 15, 2019), *https://www1.nyc.gov/assets/dhs/downloads/pdf/dhs_policy_on_serving_transgender_non_binary_and_intersex_clients.pdf.*

[730] *See Bostock,* 140 S. Ct. 1731.

[731] 42 U.S.C. 2000e *et seq.*

[732] *Bostock,* 140 S. Ct. 1731.

[733] 86 FR 14363 (Mar. 16, 2021). *See also* Letter from CFPB to Serv. & Advocacy for GLBT Elders (SAGE) (Aug. 30, 2016), *https://files.consumerfinance.gov/f/documents/cfpb_sage-response-letter_2021-02.pdf.*

[734] *See, e.g.,* 86 FR 32637 (June 22, 2021) (Department of Education interpreting title IX of the Education Amendments of 1972); 86 FR 27984 (May 25, 2021) (Department of Health and Human Services interpreting section 1557 of the Affordable Care Act); Memorandum from Jeanine M. Worden, Acting Assistant Secretary for Fair Housing and Equal Opportunity, *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021), *https://www.hud.gov/*

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The Bureau additionally explained that some other Federal agencies had also begun to re-consider how they collect information on sex by including questions about sexual orientation and gender identity as part of questions about sex. The Bureau cited the example of the Census Bureau's Household Pulse Survey,[735] which asks questions about sex assigned at birth, current gender identity, and sexual orientation.[736] The Bureau also noted that other Federal agencies and initiatives have encouraged sexual orientation and gender identity data collection in health care settings.[737]

The Bureau explained that in light of feedback it received during the SBREFA process, among other matters, the Bureau was proposing to add the option for "I prefer to self-describe" (with the ability of the applicant to write in or otherwise provide additional information) for the principal owner's sex in addition to the options currently used on the HMDA sample data collection form.

Proposed comment 107(a)(20)–8 would have explained that a financial institution would have been required to permit an applicant to provide a principal owner's sex using one or more of the following categories: Male, Female, and/or that the principal owner prefers to self-describe their sex. It would have further explained that, if an applicant indicated that a principal owner preferred to self-describe their sex, the financial institution would have been required to permit the applicant to provide additional information about the principal owner's sex. The financial institution would have been required to report to the Bureau the additional information provided by the applicant as free-form text.

Proposed comment 107(a)(20)–8 would have stated that a financial institution would be required to permit an applicant to select as many categories as the applicant chooses and that the financial institution would report the category or categories selected by the applicant, including any additional information provided by the applicant, or would report that the applicant refused to provide the information or failed to respond. It would have clarified that a financial institution would not have been permitted to report sex based on visual observation, surname, or any basis other than the applicant-provided information. Finally, proposed comment 107(a)(20)–8 would have explained how a financial institution would report sex if an applicant had fewer than four principal owners, would have provided an example, and would have directed financial institutions to proposed appendix G for additional information on collecting and reporting a principal owner's sex.

The Bureau sought comment on its proposed approach to requesting information about a principal owner's sex, including the opportunity for self-identification (by allowing the applicant to write in or otherwise provide additional information). The Bureau also sought comment on whether the sample data collection form should list examples from which the applicant could choose. The Bureau also sought comment on whether, alternatively, sex should be collected solely via the "I prefer to self-describe" option (with the ability of an applicant to write in or otherwise provide additional information). The Bureau also sought comment on whether applicants should be restricted from designating more than one category for a principal owner's sex.

The Bureau also sought comment on whether financial institutions should be required to ask separate questions regarding sex, sexual orientation, and gender identity and, if so, what categories should be offered for use in responding to each question. The Bureau also sought comment on whether it should adopt a data point to collect an applicant's lesbian, gay, bisexual, transgender, or queer plus (LGBTQ+)-owned business status, similar to the way it proposed to collect minority-owned business status and women-owned business status under proposed § 1002.107(a)(18) and (19).[738] The Bureau also sought comment on whether including such questions would improve data collection or otherwise further section 1071's purposes, as well as whether it would pose any particular burdens or challenges for industry.

Finally, the Bureau also requested information on Federal, State, and local government initiatives, as well as private sector initiatives, involving questions regarding sexual orientation and gender identity in demographic information.

Comments Received—Collecting Sex

The Bureau received comments from community groups, banks, trade associations, and individuals on its proposal for collecting information about principal owners' sex. Commenters addressed both general issues as well as specific aspects of the proposal, including whether to collect sexual orientation and gender identity data.

General comments. A couple of commenters opposed collecting information about principal owners' sex. An individual commenter stated that it does not make sense to collect such information because society's view of gender is still evolving. A lender suggested removing the sex of principal owners (along with several other data points) to reduce the amount of detail in the rule.

One industry commenter supported the collection of sex data as proposed; others supported the Bureau's proposal but suggested that the Bureau use the term "gender" instead of "sex" to be consistent with modern usage. One suggested that the Bureau also include sex category options for transgender and nonbinary.

Another commenter said that sharing information about principal owners' gender identity and sexual orientation should be voluntary for applicants,

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sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf (Department of Housing and Urban Development interpreting the Fair Housing Act).

[735] U.S. Census Bureau, *Phase 3.2 Household Pulse Survey* (undated), *https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase_3.2_Household_Pulse_Survey_FINAL_ENGLISH.pdf.* As of the date of this document, the Household Pulse Survey is in Phase 3.7, which started on December 9, 2022. *See* U.S. Census Bureau, *Household Pulse Survey Phase 3.7* (Dec. 9, 2022, updated Dec. 14, 2022), *https://www.census.gov/newsroom/press-releases/2022/household-pulse-phase-3-7.html.* The survey questionnaire used for Phase 3.7 includes the same three questions noted by the Bureau in the NPRM. *See* U.S. Census Bureau, *Phase 3.7 Household Pulse Survey* (undated), *https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase_3-7_Household_Pulse_Survey_ENGLISH.pdf.*

[736] Specifically, the Household Pulse Survey includes the following three questions: (1) What sex were you assigned at birth, on your original birth certificate? (A respondent could provide a response of male or female.); (2) Do you currently describe yourself as male, female or transgender? (A respondent also could provide a response of "none of these."); (3) Which of the following best represents how you think of yourself? (A respondent may select from the following responses: (a) Gay or lesbian; (b) Straight, that is not gay or lesbian; (c) Bisexual; (d) Something else; or (e) I don't know.

[737] *See, e.g.,* Off. of Disease Prevention & Health Promotion, *Healthy People* (2020), *https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health*; Off. of the Nat'l Coordinator of Health Info. Tech., *2021 Interoperability Standards Advisory* (2021), *https://www.healthit.gov/isa/sites/isa/files/inline-files/2021-ISA-Reference-Edition.pdf*; Ctrs. for Disease Control & Prevention, *Collecting Sexual Orientation and Gender Identity Information* (Apr. 1, 2020), *https://www.cdc.gov/hiv/clinicians/transforming-health/health-care-providers/collecting-sexual-orientation.html.*

[738] For a discussion of the comments received by the Bureau with regard to its request for comment on whether to include a data point to collect information about applicants' LGBTQ+-owned business status, the Bureau refers readers to the section-by-section analyses of §§ 1002.102(k) (definition of LGBTQI+ individual), 1002.102(*l*) (definition of LGBTQI+-owned business), and 1002.107(a)(18) (minority-owned, women-owned, and/or LGBTQI+-owned business status).

noting that individuals that are a part of the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA) community are concerned about harassment and should be protected.

Collection of sexual orientation and gender identity information. Most of the comments received by the Bureau in response to its proposal for collecting information about a principal owner's sex were in the context of whether the Bureau should also collect information about principal owners' sexual orientation and gender identity.

Several banks, trade associations, and individual commenters opposed adding inquiries about principal owners' sexual orientation and gender identity to the final rule. A few stated that bank employees would feel uncomfortable requesting this information; that applicants would refuse to provide the information or would be offended by the questions; or that separate questions for sex, sexual orientation, and gender identity would be invasive.

A few of these commenters stated that requiring financial institutions to ask separate questions for sex, sexual orientation, and gender identity could potentially further segregate and stigmatize LGBTQ individuals and their businesses, when members of that community already face bias and discrimination. These commenters also raised concerns about the security of the collected information, noting that storing it with financial institutions and in a nationwide database exposes the information to not only a number of persons with authorized access but also potentially to hackers. These commenters stated that although there is some protection from employment discrimination under Federal law due to *Bostock,* there are States where discrimination against LGBTQ individuals in other forms is legal and inferences about one's sexuality could have serious negative impacts. The commenters also expressed concern that the information could be used for other purposes, with one commenter additionally expressing a concern that such previously collected data could be used for unintended purposes. Another commenter stated that the information should be requested only if information is also provided to applicants to allow them to make informed decisions about providing the information, which includes a warning that discrimination based on sexual orientation may be allowed in certain States. Some commenters also opposed collecting information on principal owners' gender identity and sexual orientation, on the grounds that such information is not needed by financial institutions to make loans and it should have no bearing on an applicant's ability to qualify for a loan.

Several other industry commenters expressed concern that adding more inquiries to a demographic data collection form would add complexity to the collection process and increase the burden on financial institutions. One urged the Bureau to not include inquiries about such personal information in the business lending process without more stakeholder input as to the benefits and burdens of collecting the data and before publishing such sensitive information. These commenters also suggested that the Bureau give financial institutions the option of collecting the information.

Some commenters suggested that the Bureau should include only ''Male'' and ''Female'' categories as responses to a request for a principal owner's sex information. One bank opposed the inclusion of options for gender choices and free-form text, stating that there are many possible gender categories and including those categories or a write-in field could dilute the data and lead to inconclusive findings. Several lenders also specifically urged use of only ''Male'' and ''Female'' categories as answer options in the final rule, for alignment with sex categories used to collect HMDA data, on the grounds that it would avoid confusion among financial institutions and applicants, promote efficient implementation and reporting, reduce administrative complexity, and facilitate compliance. One bank expressed concern about use of the proposed self-describe sex response option for applications reported under both HMDA and section 1071.

In contrast, a range of commenters, including many community groups, research and advocacy groups, community-oriented lenders, and individual commenters, urged the Bureau to require the collection of more detailed and accurate information about gender identity and sexual orientation than would be collected under the Bureau's proposal. These commenters generally stated that more detailed information is necessary to account for small businesses owned by people with intersectional identities and orientations, to see if they experience discrimination, enforce fair lending laws, and to allow policymakers and the public to have a better understanding of and address gaps and community needs. Several commenters asserted that to the final rule should reflect that gender is not binary and be more inclusive. Others argued that collecting principal owners' gender identity information will enhance the Bureau's and the public's ability to enforce ECOA for transgender individuals and gender minorities and collecting their sexual orientation information will likewise facilitate the same as to lesbians, gays, bisexuals, and other sexual minorities, consistent with the purposes of section 1071. Another commenter stated that collecting information about gender identity and sexual orientation would reduce the burden of implementing future legislation requiring such collection.[739] Another commenter said that collecting data on gender identity and sexual orientation would allow lenders, especially CDFIs, to be more accountable to their mission of economic justice and financial inclusion. Some commenters urged the Bureau to follow best practices and directed the Bureau to resources made available and research conducted by the Williams Institute at the University of California Los Angeles School of Law.

A number of these commenters urged the Bureau to not conflate lines of inquiry for gender identity and sexual orientation, with some specifically suggesting separate sets of questions, either in addition to or in place of, the inquiry about principal owners' sex as proposed by the Bureau.[740]

One commenter stated that respondents are unlikely to consider sexual orientation and gender identity to be sensitive and would likely provide their information, citing a study as to the collection of such information in health centers and another relating to attitudes of sexual minorities responding to a 2020 survey administered by the Census Bureau. Commenters also noted that other Federal surveys ask questions about gender identity and sexual orientation, including the Census Bureau and the Centers for Disease Control and Prevention, and that questions to identify transgender respondents are included on State and investigator-led surveys. One commenter asserted that the proposal collects less information than other Federal agencies, citing the example of the Census Bureau.

[739] The commenter cited the LGBTQ Business Equal Credit Enforcement and Investment Act (H.R. 1443, 117th Cong. (2021)), which sought to amend ECOA section 704B to require the collection of an applicant's principal owners' sexual orientation and gender identity, in addition to information about sex.

[740] For example, some commenters suggested separate categories for gender (Cis woman, Cis man, Trans woman, Trans man, Non-binary or gender non-conforming, and Other (with a write-in text field)) and sexual orientation (straight/heterosexual, bisexual, and queer, and other (with a write-in text field)).

Commenters also noted that the Federal government has long considered what best practices should apply for the measurement of sexual orientation and gender identity information, such as through the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys, and by commissioning a study looking at the measurement of sex, gender identity, and sexual orientation through the National Academies of Sciences, Engineering, and Medicine (the National Academies).[741]

Legal authority. Several research and advocacy organizations argued that the Bureau has the legal authority to collect information about the gender identity and sexual orientation of principal owners. Generally, these commenters stated that ECOA and section 1071 provide the Bureau with a broad grant of authority to issue regulations requiring the collection of gender identity and sexual orientation data. The commenters also highlighted that unlawful discrimination based on ''sex'' under ECOA includes discrimination based on sexual orientation and gender identity, consistent with the U.S. Supreme Court's decision in *Bostock.* As a result, they said, collecting sexual orientation and gender identity data would facilitate the purposes of section 1071 by enhancing the agency's ability to understand small business lending discrimination based on sexual orientation and gender identity, enforce fair lending laws, and identify business and community development needs and opportunities of small businesses.

However, several industry commenters argued that the collection of sexual orientation and gender identity information is not clearly required. One stated that there is no indication in the statute that Congress intended the term ''sex'' as used in section 1071 to encompass sexual orientation and/or gender identity. Another emphasized that the statute focuses on the collection and reporting of data about the defined term ''women-owned businesses,'' and asserted it is thus not apparent that the section 1071 data collection is meant to include such data. Another commenter argued that neither Congress nor the Supreme Court in *Bostock* has taken specific action to change the scope of the prohibition against sex discrimination in ECOA to include discrimination on the bases of sexual orientation and gender identity.

Need for information on gender identity and sexual orientation. Some community groups and research and advocacy organizations generally stated that data are needed to understand LGBTQI+ individuals' and business owners' experiences in accessing small business credit. Some emphasized that available Federal small business or fair lending data do not currently include sexual orientation and gender identity information. One commenter noted that the Federal data that exist on LGBTQ individuals' access to credit are generally limited to the population of cohabitating same-sex couples because such data are often collected through a marital status question on Census Bureau surveys.

Nevertheless, these commenters stated that available research suggests that sexual and gender minorities encounter discrimination when attempting to access credit. The commenters cited research, based on the 2019 Federal Reserve Board Survey of Household Economic Decisionmaking, finding that LGBT individuals (and particularly LGBT persons of color and depending on gender) are more likely to have their applications for credit rejected and that they are more likely to be approved for less credit than they wanted.[742] The commenters stated that studies based on HMDA data have also found that same-sex couples are denied home loans more often and that the loans they do receive have higher interest rates and fees than different-sex couples of similar financial and credit quality. Similarly, loans made in neighborhoods with a higher density of LGBTQI+ individuals generally have higher interest rates and fees than neighborhoods with a lower density.[743] One commenter stated that the analysis likely understates these disparities due to HMDA data limitations.[744] A research and policy organization focusing on gender identity and sexual orientation issues also cited reports and analyses highlighting disparities in home ownership between LGBT adults and non-LGBT adults, same-sex couples and different-sex couples, and among sexual minorities versus heterosexual individuals and also suggesting that home ownership among transgender adults is particularly low.[745] This commenter also stated that such research noting disparities among LGBTQI+ persons based upon race, sex, and sexual orientation suggests that the data collected under section 1071 should allow identification of individuals who may have intersectional identities.

Commenters also noted that LGBTQI+ individuals and businesses are key parts of the population and economy in this country, yet face discrimination and disparities in a number of areas. They stated that there are an estimated 11 million LGBT adults, which make up around 4.5 percent of the total U.S. adult population. They stated that high numbers of LGBTQ adults have self-reported experiences with physical and verbal abuse and violence, job loss, and workplace harassment and discrimination. They also noted that prior to the COVID–19 pandemic, LGBTQ individuals were more likely to report having experienced economic hardship, from unemployment, homelessness, and in other areas. The commenters also emphasized that studies show that during the pandemic, LGBTQ adults, and particularly LGBTQ people of color and gender minorities, have disproportionately experienced the negative financial effects of the COVID–19 pandemic, including food insecurity, job loss, and housing insecurity.[746] One

[741] Since the comment period for the NPRM closed, the National Academies published its report on the study. *See* Nat'l Acad. of Scis., Eng'g, & Med., *Measuring Sex, Gender Identity, and Sexual Orientation* (2022), *https://www.ncbi.nlm.nih.gov/books/NBK578625/pdf/Bookshelf_NBK578625.pdf.*

[742] Spencer Watson *et al.,* Ctr. for LGBTQ Econ. Advancement & Rsch., *The Economic Well-Being of LGBT Adults in the U.S. in 2019* (2021), *https://lgbtq-economics.org/wp-content/uploads/2021/06/The-Economic-Well-Being-of-LGBT-Adults-in-2019-Final-1.pdf.*

[743] *See* Jason Richardson & Karen Kali, Nat'l Cmty. Reinvestment Coal., *Same-Sex Couples and Mortgage Lending* (June 22, 2020), *https://ncrc.org/same-sex-couples-and-mortgage-lending/*; Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers,* 116 Procs. of the Nat'l Acad. of Sci. (PNAS) PROCs. NAT'L ACAD. SCI. 9293 (Mar. 16, 2019), *https://doi.org/10.1073/pnas.1903592116.*

[744] *See* Jason Richardson & Karen Kali, Nat'l Cmty. Reinvestment Coal., *Same-Sex Couples and Mortgage Lending* (June 22, 2020), *https://ncrc.org/same-sex-couples-and-mortgage-lending/.*

[745] Studies cited by the commenters include, for example: Adam P. Romero, Shoshana K. Goldberg, & Luis A. Vasquez, Williams Inst., *LGBT People and Housing Affordability, Discrimination, and Homelessness* (2020), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf*; Kerith Conron, Williams Inst., *Financial Services and the LGBTQ+ Community: A Review of Discrimination in Lending and Housing, Testimony Before the Subcommittee on Oversight and Investigations* (2019), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-US-House-Financial-Services-Oct-2019.pdf*; Freddie Mac, *The LGBT Community: Buying and Renting Homes* (2018), *http://www.freddiemac.com/fmac-resources/research/pdf/Freddie_Mac_LGBT_Survey_Results_FINAL.pdf*; Kerith J. Conron, Shoshana K. Goldberg, & Carolyn T. Halpern, *Sexual Orientation and Sex Differences in Socioeconomic Status: A Population-Based Investigation in the National Longitudinal Study of Adolescent to Adult Health,* 72 J. Epidemiology & Cmty. Health 1016 (Nov. 2018), *https://pubmed.ncbi.nlm.nih.gov/30190439.*

[746] *See* Thom File & Joey Marshall, U.S. Census Bureau, *Household Pulse Survey Shows LGBT Adults More Likely to Report Living in Households With Food and Economic Insecurity Than Non-LGBT Respondents* (Aug. 11, 2021), *https://www.census.gov/library/stories/2021/08/lgbt-*

commenter also highlighted that research shows that transgender individuals are disadvantaged as compared to their cisgendered counterparts across a number of socio-economic factors, such as education levels and percentages living at or below the poverty level, among others.[747]

One commenter cited a study estimating that about 7.7 million LGBT adults live in States without explicit statutory protections against discrimination on the basis of sexual orientation and gender identity in credit.[748] This commenter also noted research finding that while 30 States have laws analogous to ECOA, only about half explicitly prohibit discrimination on the basis of sexual orientation or gender identity, leaving a significant number of LGBT adults in the United States without protection from credit discrimination under State law.[749] Further, this commenter stated that LGBTQ businesses may generally have a particular need for credit, because they often lack the family support other small business entrepreneurs may rely upon to begin their businesses.

Suggestions for collecting sexual orientation and gender identity information. A number of commenters suggested specific modifications to the Bureau's proposal, generally by either adding response categories to the proposed (single) inquiry about a principal owner's sex; by recommending two separate inquiries for the identification of a principal owner's gender (as opposed to sex) and sexual orientation; or by suggesting separate inquiries as to each of a principal owner's sex, gender identity, and sexual orientation.

Generally, commenters who suggested additional response categories suggested adding such options in the context of a single inquiry for information about a principal owner's sex. Some commenters suggesting adding an additional category, such as "Other," to allow the Bureau to analyze whether nonbinary individuals face discrimination from lenders and urged the Bureau to avoid a data collection that forces applicants to provide their principal owners' information on a strict binary sex/gender basis. Several industry commenters suggested the Bureau remove the self-describe option with a write-in text field with a third category, such as "non-binary." These commenters expressed concern that the write-in text field may create data integrity problems or add complexity to reporting standards.

Other commenters suggested specific sex categories for the Bureau's consideration. A group of trade associations suggested adding sex categories for transgender and nonbinary. A community group suggested adding a "non-binary" sex category and any others according to best practices, in order to bring transparency as to the treatment of that population. Another suggested adding "Non-binary," "Transgender Male," "Transgender Female," stating that these categories are widely accepted by the LGBTQ community, will provide more data, and will be more inclusive. This commenter also supported allowing applicants to select one or more options. A CDFI lender recommended that the Bureau include a list of examples that an applicant could refer to when self-describing, like intersex, non-binary, or transgender. This commenter stated that providing examples for the self-describe option would streamline the data collection and analysis.

A bank suggested that instead of requesting information from applicants about their principal owners' sex, that the Bureau identify a principal owners' information based on what is listed on the principal owner's driver's license. The bank noted that some states, like New York, allow residents who identify as nonbinary or intersex to use an "X" marker on their State driver's licenses and stated that beneficial owners' driver's licenses must be provided as a result of FinCEN's customer due diligence rule when an account is opened. The bank acknowledged that different states may not allow the use of an "X" marker and that some principal owners may not identify with the gender marker on their driver's license but suggested that aligning the data collection with this supporting documentation would remove the potential for error and regulatory scrutiny.

Some commenters urged the Bureau to revise its proposal to include two sets of inquiries, one addressing gender identity and the other sexual orientation, each with multiple categories from which an applicant could select. One community group suggested two separate inquiries are necessary, to accurately measure disparities and discrimination. The community group suggested that for the inquiry about gender identity, response options could include "Male," "Female," "Transgender," and "Do not identify as female, male, or transgender." For the inquiry about sexual orientation, the community group stated response options could include "Straight," "Gay or lesbian," "Bisexual," and "Transsexual, or gender non-conforming." This commenter also suggested the Bureau consult experts on these issues. Some other community groups suggested that, to reflect current language around gender-identity and expression, categories for gender should include "Cis woman," "Cis man," "Trans woman," "Trans man," "Non-binary or gender non-conforming," and "Other" (with a write-in text field). For sexual orientation, the commenters suggested "Straight/heterosexual," "Bisexual," "Queer," and "Other" (with a write-in text field). One commenter noted that the answer options for each inquiry should include those to allow the applicant to choose not to state its response and an "Other" option (with a write-in text field).

Several research and policy organizations focusing on gender identity and sexual orientation issues generally stated that because sex, sexual orientation, and gender identity are related but intellectually distinct concepts, the Bureau should collect such information through three separate inquiries addressing each concept instead of through one question asking about a principal owner's sex. A community group stated that the Bureau's proposal does not sufficiently encompass gender, gender identity, and sexual orientation to address fair lending concerns.

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community-harder-hit-by-economic-impact-of-pandemic.html; Brad Sears, Kerith J. Conron, & Andrew R. Flores, Williams Inst., *The Impact of the Fall 2020 COVID–19 Surge on LGBT Adults in the US* (Feb. 2021), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-Fall-Surge-Feb-2021.pdf*; Christy Mallory, Brad Sears, & Andrew R. Flores, Williams Inst., *COVID–19 and LGBT Adults Ages 45 and Older in the US* (May 2021), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-45-May-2021.pdf*; Kerith J. Conron & Kathryn K. O'Neill, Williams Inst., *Food Insufficiency Among Transgender Adults During the COVID–19 Pandemic* (Dec. 2021), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf*; Movement Advancement Project, *The Delta Variant & the Disproportionate Impacts of COVID–19 on LGBTQ Households in the U.S., Results from an August/September 2021 National Poll* (Nov. 2021), *https://www.lgbtmap.org/file/2021-report-delta-impact-v2.pdf*.

[747] *See* Kerith J. Conron & Kathryn K. O'Neill, Williams Inst., *Food Insufficiency Among Transgender Adults During the COVID–19 Pandemic* (Dec. 2021), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf*.

[748] Kerith J. Conron & Shoshana K. Goldberg, Williams Inst., *LGBT People in the US Not Protected by State Non-Discrimination Statutes* (Apr. 2020), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf*.

[749] Christy Mallory, Luis A. Vasquez, & Celia Meredith, Williams Inst., *Legal Protections for LGBT People After Bostock* v. *Clayton County* (Aug. 2020), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf*.

Research and policy organizations also suggested the Bureau take an approach similar to that used in the Census Bureau's Household Pulse Survey, which they characterized as taking a "two-step" approach to asking about a respondent's sex, with one question about the respondent's sex assigned at birth and a second question about their current gender. They also recommended the Household Pulse Survey approach in asking a separate question about sexual orientation, which the commenters noted aligns with a recommendation from a 2009 Sexual Minority Assessment Research Team report [750] on best practices for asking questions about sexual orientation on surveys. One also urged the Bureau to examine a two-step approach to sex for the final rule, noting that it was based on research and recommended by a panel of experts known as the Gender Identity in U.S. Surveillance group, through the Williams Institute at the University of California Los Angeles School of Law, as one that is likely to have high sensitivity and specificity in distinguishing transgender and gender minority respondents from cisgender respondents.[751] The commenter also recommended that the Bureau consider if any refinements are necessary in the context of section 1071, conduct user testing, and also coordinate in the future with other Federal agencies to improve its measurements of principal owners' sex.

For the question about sexual orientation, research and policy organizations recommended using the same or similar questions as presented in the Census Bureau's Household Pulse Survey and the 2009 Sexual Minority Assessment Research Team report. A community group also suggested that the Bureau adopt the Census Bureau's approach with the Household Pulse Survey, but stated that more response categories may be necessary to better capture the LGBTQIA+ community.

Selection of multiple responses. The Bureau received several responses to the Bureau's question about whether applicants should be restricted from designating more than one category for a principal owner's sex. Two commenters supported the Bureau's proposal to allow an applicant to select multiple sex categories, stating that limiting applicants to one answer option may be viewed as marginalizing the principal owner's personal characteristics for individuals whose gender is fluid. Another suggested allowing the selection of just one response category, which it said would streamline data collection. Two research and policy organizations suggested that the Bureau limit applicants from selecting more than one response to the inquiry about sex assigned at birth because medical records in the United States generally allow only male or female sex assignments. They also suggested that the Bureau allow just one selection in response to a question about sexual orientation. But for gender identity, the applicant suggested allowing applicants to select multiple response options.

Self-describe response option. Several commenters supported the Bureau's proposed "I prefer to self-describe" option (with the ability to write in or otherwise provide additional information). A business advocacy group stated that the information collected from the option will bring attention to inequitable lending practices based on gender identity. As noted above, one commenter supported the proposed answer option, but suggested that the Bureau include a list of examples. The commenter opposed, however, the use of the option as the only way to collect information about principal owners' sex. Another commenter supported having the "I prefer to self-describe" option as the only way used to collect sex information, stating that this approach would promote diversity and acceptance and that the Bureau's proposal may make applicants feel uncomfortable expressing their true gender identity.

However, several industry and research and policy organization commenters opposed the proposed "I prefer to self-describe" option. One commenter said it would be confusing for applicants and bank employees, and recommended having the Bureau's data collection for principal owners' sex match that under Regulation C. Other commenters generally cited data quality concerns related to potential write-in field responses. Two such commenters noted that in the HMDA free-form ethnicity and race data, they commonly see responses that would fit into an existing category and expressed concern that similar issues would arise under the Bureau's proposal. Two industry commenters also noted that the write-in field could diminish the accuracy and utility of collected data, because fewer responses would be reported for other listed categories. One industry commenter also noted that a write-in field may add complexity to reporting standards. Another stated that the Bureau may encounter varying spellings and misspellings, which would create reporting burdens and diminish the accuracy of the information received by the Bureau.

A research and policy organization stated that because the Bureau will not be including write-in responses in what is released to or analyzed for the public, write-in responses allowing applicants to self-describe their principal owners' sex, sexual orientation, or gender identity would prevent respondents from being included in the data for analysis. The commenter suggested that the Bureau assess the performance of questions as to gender identity and sexual orientation first and then make revisions as needed. The commenter also stated that it also did not recommend including the proposed "I prefer to self-describe" option as a way to capture individuals with intersex traits, and noted that it is not generally recommended that researchers capture information on intersex status through a question on sex.

Other research and policy organizations stated a concern that free-form text responses would require substantial effort by the Bureau and others to distinguish transgender individuals and gender minorities from respondents using the "I prefer to self-describe" option, even though female or male responses would have been appropriate. This commenter noted that analysis of free-form text fields can be time-intensive and responses challenging to categorize, leading to discarded data, reduced sample sizes, lessened statistical power, and potentially errors in classification. The commenter also noted that although a write-in response for gender identity to capture the many gender identities and communities that exist may work in some circumstances, it does not recommend it for a data collection of the anticipated size and complexity of the effort under section 1071. With regard to sexual orientation, the commenter noted that most people with same-sex attraction are likely to choose the terms gay, lesbian, or bisexual if they are the only terms provided, and thus a self-describe option would just reduce the number of identifiably lesbian, gay, and bisexual principal owners in the section 1071 data collection and reduce the usefulness of the data.

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[750] Sexual Minority Assessment Rsch. Team (SMART), Williams Inst., *Best Practices for Asking Questions About Sexual Orientation on Surveys* (2009), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf.*

[751] The GenIUSS Grp., Williams Inst., *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys* (Sept. 2014), *https://williamsinstitute.law.ucla.edu/publications/geniuss-trans-pop-based-survey/.*

Intersex status. Research and policy organizations suggested that the Bureau add a specific inquiry regarding variations of sex characteristics in the final rule or in the future, to identify intersex business owners and their experiences. They emphasized that people with variations in sex characteristics may comprise as much as 1.7 percent of the population. And, although little population-based data exists, according to the commenter, intersex people face documented social and health disparities. This in turn, they said, could affect their economic opportunities. Moreover, according to the commenter, the increased visibility of intersex individuals could also make small business owners with intersex traits more vulnerable to discrimination. They also stated that the Department of Justice's Title IX Legal Manual rationale—finding that title IX's prohibition on sex discrimination includes discrimination based on sex characteristics, including intersex traits—should also apply to ECOA. They noted that a consensus study from the National Academies had recommended that the Federal government develop and evaluate measures to identify intersex populations and recommended that the Bureau review another pending National Academies study with recommendations on this area.[752]

Final Rule—Collecting Sex

For the reasons set forth herein, the Bureau has revised its proposal regarding the collection of information about the sex of the principal owners of a small business applicant. Under final comment 107(a)(19)–15, if collecting the information using a paper or electronic form, the financial institution must make the request using the term "sex/gender" and must permit applicants to respond by using free-form text. If collecting the information orally, the financial institution must inform the applicant of the opportunity to provide each principal owner's sex/gender and record the response. As with other protected demographic information, the applicant can refuse to provide the requested information. Unlike the Bureau's proposal, the final rule does not use specific sex categories, such as "Male" and "Female," for a principal owner's sex/gender. The Bureau has made conforming changes, removed duplicative content, and updated cross-references, in comment 107(a)(19)–15 and other comments that relate to collection of principal owners' sex.

As an initial matter, the Bureau believes that collecting information about a principal owner's sex, gender identity, and sexual orientation is within section 1071's mandate. Following the Supreme Court's holding in *Bostock,* even though the term "sex" is not defined in ECOA or in Regulation B, the Bureau interprets ECOA's and Regulation B's prohibitions against discrimination on the basis of "sex" to include discrimination based on sexual orientation and gender identity.[753] As stated by the Court, sex discrimination encompasses sexual orientation discrimination and gender identity discrimination, as those forms of discrimination necessarily involve consideration of sex.[754] Because section 1071 is an enumerated provision of ECOA and the final rule is part of Regulation B, this interpretation as to what is included within the scope of the term "sex" necessarily applies to the collection of information about a principal owner's "sex" under section 1071 as well.

The Bureau believes further that available research, including that cited by commenters and discussed above, showing disparities in access to credit across gender identity and sexual orientation supports the importance of collecting gender identity and sexual orientation small business lending data.[755]

There was no clear consensus among commenters as to how information about the sex of small businesses' principal owners should be collected.

As described above, the Bureau received a diverse array of comments recommending a range of response options to the proposed inquiry about a principal owner's sex and suggesting questions in addition to, or instead of, the Bureau's proposed query about a principal owner's sex. The Bureau notes that at the Federal level, there is wide variance in data collection approaches, question phrasing, and answer options, and that the Federal government's approach is in flux.[756] For example, on January 11, 2023, shortly before this rule was issued, OMB released new recommendations for agencies on the best practices for the collection of sexual orientation, gender identity, and sex characteristics data on Federal

[752] *See* Nat'l Acads. of Scis., Eng'g, & Med., *Understanding the Well-Being of LGBTQI+ Populations* (2020), *https://nap.nationalacademies.org/catalog/25877/understanding-the-well-being-of-lgbtqi-populations.* The National Academies has issued the report anticipated by the commenter. *See* Nat'l Acads. of Scis., Eng'g, & Med., *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health* (2022), *https://www.ncbi.nlm.nih.gov/books/NBK578625/pdf/Bookshelf_NBK578625.pdf.*

[753] *Bostock,* 140 S. Ct. 1731; 86 FR 14363 (Mar. 16, 2021).

[754] *See Bostock,* 140 S. Ct. 1731.

[755] *See, e.g.,* Ctr. for LGBTQ Econ. Advancement & Rsch., *The Economic Well-Being of LGBT Adults in the U.S. in 2019* (June 2021), *https://lgbtq-economics.org/research/lgbt-adults-2019/* (LGBT adults more likely than non-LGBT adults to report being turned down by lenders and to be offered credit at rates higher than desired); Hua Sun & Lei Gao, *Lending practices to same-sex borrowers,* Proceedings of the Nat'l Acad. Sci. of the U.S. of Am. (May 2019), *https://doi.org/10.1073/pnas.1903592116* (finding same-sex couples more likely to be denied a mortgage than different-sex couples); J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination,* 86 U. Chi. L. Rev. 1 (2019), *https://lawreview.uchicago.edu/publication/empirical-analysis-sexual-orientation-discrimination* (finding that same-sex male home loan co-applicants were less likely to have their loan applications accepted compared to white, different-sex co-applicant pairs; male same-sex pairs with Black applicants had significantly worse acceptance outcomes).

[756] *See* 86 FR 56356, 56482 (Oct. 8, 2021) (discussing approach used by the Census Bureau's Household Pulse Survey, asking separate questions for sex assigned at birth, current gender identity, and sexual orientation); *id.* at 56482 n.686 (discussing other Federal agency approaches in health care settings). *See also* 31 CFR 35.28(h), (i) (in annual reports by participants in the U.S. Treasury's State Small Business Credit Initiative (SSBCI) program, requiring information about program beneficiaries' principal owner's gender (using categories: female; male; nonbinary; prefer to self-describe, with an option to write in information; prefer not to respond; or that the business did not answer) and sexual orientation (using categories: gay or lesbian; bisexual; straight, that is, not gay, lesbian, or bisexual; something else; prefer not to respond; or that the business did not answer); 2020 Census Official Questionnaire (inquiring as to each person's sex (*e.g.,* "What is Person 1's sex? Mark (x) ONE box."), with answer options: "Male" and "Female" and asking about the relationships with other household members (*e.g.,* "How is this person related to Person 1? Mark (X) ONE box."), with answer options including, *inter alia,* "opposite-sex husband/wife/spouse", "opposite-sex unmarried partner, "same-sex husband/wife/spouse", and "same-sex unmarried partner"); Soc. Sec. Admin., *How do I change the sex identification on my Social Security record?* (KA–01453) (last updated Oct. 25, 2022), *https://faq.ssa.gov/en-us/Topic/article/KA-01453* (individuals can provide sex identification evidence that is binary or non-binary, but stating that SSA record systems currently require a sex designation of female or male); U.S. Dep't of State, *X Gender Marker Available on U.S. Passports Starting April 11, 2022* (Mar. 31, 2022), *https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/*; U.S. Equal Emp. Opportunity Comm'n, *EEOC Adds X Gender Marker to Voluntary Questions During Charge Intake Process* (June 27, 2022), *https://www.eeoc.gov/newsroom/eeoc-adds-x-gender-marker-voluntary-questions-during-charge-intake-process*; Admin. for Children & Fams., U.S. Dep't of Health & Hum. Servs., *Proposed Information Collection Activity; Domestic Victims of Human Trafficking Program Data (OMB #0970–0542),* 87 FR 45107 (July 27, 2022) (proposing changes to collection of participant demographics for Domestic Victims of Human Trafficking Services and Outreach Program grant programs); Admin. for Children & Fams., U.S. Dep't of Health & Hum. Servs., *Proposed Information Collection Activity; SOAR (Stop, Observe, Ask, Respond) to Health and Wellness Training (SOAR) Demonstration Grant Program Data (New Collection),* 87 FR 52386 (Aug. 25, 2022) (indicating that data to be collected with regard to the SOAR program will include client sex, gender identity, sexual orientation.)

statistical surveys, including strategies to preserve data privacy and safety.[757] The Bureau also notes the consensus study from the National Academies cited by a commenter that indicates that the terms used to describe individuals who identify as or exhibit attractions and behaviors that do not align with heterosexual or traditional male-female binary gender norms are evolving.[758]

As a result of these factors, the Bureau believes that an approach that allows principal owners to designate their sex/gender with the ability to write-in or provide additional information (such as in a free-form field on a paper or electronic form) will encourage applicant self-identification using terminology that may change over time. To increase applicants' autonomy to provide responses they feel best characterize their principal owners, the final rule does not include additional sex category responses suggested by commenters nor does it require a financial institution to provide a list of example responses when requesting that an applicant provide its principal owners' sex. This approach mitigates the concern of some commenters that a list of disaggregated categories would be difficult for some lender staff to ask and for some applicants to be asked.

In partial response to the several commenters who urged that the Bureau use the term "gender" instead of "sex," the Bureau is requiring financial institutions to use the term "sex/gender" when requesting information about principal owners' sex. As explained above, the Bureau interprets ECOA's and Regulation B's prohibitions against discrimination on the basis of "sex" to also include, *inter alia,* discrimination based on gender identity; this interpretation as to what is included within the scope of the term "sex" necessarily also applies to the collection of information about a principal owner's "sex" under section 1071.[759] The Bureau believes that requiring financial institutions to ask for information about "sex/gender" will provide principal owners with the flexibility and autonomy to use terms that they prefer.

Although some commenters requested that the Bureau require the collection of principal owners' sexual orientation information and intersex status in addition to the collection of information about their gender identity, the final rule does not include these specific inquiries. The Bureau believes that such specific inquiries about individuals would likely be perceived as more invasive than a general request as to "sex/gender" and, as explained above, the overall LGBTQI+-ownership status of the business. Accordingly, the Bureau is concerned that questions to this effect could impact the overall willingness of applicants to provide demographic information, as noted by some commenters.

Some commenters expressed concerns that collecting data via write-in text fields may lead to data analysis issues. The Bureau anticipates that its review of responses to the sex/gender inquiry will result in data that could be used by the Bureau and other regulators and, once grouped into categories, publicly released subject to any necessary modifications or deletions for privacy purposes.

The Bureau believes that principal owners' sex/gender and applicants' LGBTQI+-owned business status data points together strike a balance that respects for small business owners' autonomy in self-identification, while also providing the Bureau and the public with information needed to further section 1071's statutory purposes.

The Bureau recognizes that the way financial institutions will collect data about sex under the final rule differs from the collection of information about the sex of home mortgage applicants under Regulation C/HMDA.[760] Although the collection of ethnicity, race, and sex data in both contexts serves related fair lending purposes, the two regulations have different legal authorities, cover different markets, and were developed at different times. The Bureau has specifically tailored the collection of sex data under this final rule implementing section 1071 for the small business lending context, in consideration of the comments received and of continuing developments in Federal government's approach to collecting information about sex, gender identity, and sexual orientation.

The Bureau has also considered commenters' statements that small business applicants may feel uncomfortable and have privacy concerns about providing sensitive information to lenders related to the sex of their principal owners. As discussed in greater detail in part VIII below, after receiving a full year of reported data, the Bureau will assess privacy risks associated with this data and on that basis, make appropriate pre-publication modification and deletion decisions. The Bureau takes the privacy of such information seriously and intends to make appropriate modifications and deletions.

Commenters also included suggestions for whether to allow applicants to select only one or multiple response categories in response to questions related to a principal owner's sex. As explained above, the Bureau has decided to include only a self-describe response option in response to the question about a principal owner's sex/gender at this time, rendering these comments moot.

One commenter stated that providing information about a principal owner's sexual orientation and gender identity should be optional for the applicant. The Bureau agrees, and applicants have a right to refuse to provide responses to questions about protected demographic information. As explained in final comment 107(a)(19)–1, financial institutions must permit an applicant to refuse to answer the financial institution's inquiry and must inform the applicant that it is not required to provide the information.

With regard to some commenters' suggestion that questions about a principal owner's gender identity and sexual orientation should be optional for financial institutions, the Bureau is not requiring separate questions for sex, gender identity, and sexual orientation for the reasons above. Thus, these commenters' suggestion is moot.

The Bureau does not believe it would be appropriate, however, to remove the requirement to collect principal owners' sex, suggested by some commenters. As discussed above, the collection of information about sex is required under section 1071.

The Bureau is not requiring financial institutions to report what sex or gender is indicated on a principal owner's State driver's license, as requested by one commenter. As the commenter acknowledged, State requirements differ as to what residents may select as to their sex and/or gender on their State government-issued identification and the available selections may not be adequate as to a principal owner's self-

[757] Off. of Mgmt. & Budget, Off. of the Chief Statistician of the U.S., *Recommendations on the Best Practices for the Collection of Sexual Orientation and Gender Identity Data on Federal Statistical Surveys* (Jan. 11, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/01/SOGI-Best-Practices.pdf.*

[758] Nat'l Acads. of Scis., Eng'g, & Med., *Understanding the Well-Being of LGBTQI+ Populations* 1–2. *See also* Nat'l Acads. of Scis., Eng'g, & Med., *Measuring Sex, Gender Identity, and Sexual Orientation* 1–4 to 1–5 (discussing terms and identities associated with the concepts of gender, sex, and sexual orientation).

[759] 86 FR 14363 (Mar. 16, 2021).

[760] As the Bureau is exempting HMDA-reportable transactions from the data collection requirements of the final rule, in § 1002.104(b)(2), strict consistency between reporting categories is unnecessary.

identified sex and/or gender. As noted above, the Bureau believes that the collection of principal owners' sex information under this rule should be based solely on an applicant's self-identification. However, as the commenter also pointed out, some governmental authorities allow individuals to indicate their sex as ''X'' in government-issued documents. Nothing in this rule would interfere with a principal owner choosing to designate their sex in that way in the self-describe response option.

With regard to one commenter's statement that the Bureau should not allow the use of previously collected information due to concern about misuse of such data, the final rule specifies how previously collected information may be used, as discussed further in the section-by-section analyses of §§ 1002.107(d) and 1002.110(e) below.

Regarding a commenter's suggestion that the Bureau should consult further with stakeholders before finalizing any publication of information about sexual orientation and gender identity of principal owners, the Bureau intends to engage further with stakeholders before publishing data, as discussed in part VIII below.

Proposed Rule—Collecting Ethnicity and Race via Visual Observation or Surname in Certain Circumstances

The Bureau proposed that financial institutions be required to collect and report at least one principal owner's ethnicity and race based on visual observation and/or surname in certain circumstances. This would have been required if the financial institution met in person with one or more of the applicant's principal owners and the applicant did not provide ethnicity, race, or sex information for at least one principal owner in response to the financial institution's inquiry pursuant to proposed § 1002.107(a)(20).

The Bureau noted that demographic response rates in the SBA's Paycheck Protection Program data are much lower when compared to ethnicity, race, and sex response rates in HMDA data.[761] The Bureau reasoned that without a visual observation and/or surname collection requirement, meaningful analysis of principal owner ethnicity and race data could be difficult, significantly undermining section 1071's purposes. Historically, one challenge under HMDA has been the reluctance of some applicants to voluntarily provide requested demographic information, such as ethnicity and race. The Bureau explained that the requirement in Regulation C to collect race, sex, and ethnicity on the basis of visual observation or surname is an important tool to address that challenge, and that it believes that the requirement has resulted in more robust response rates in the HMDA data.

Accordingly, the Bureau proposed that financial institutions collect at least one principal owner's ethnicity and race (but not sex) on the basis of visual observation and/or surname in the circumstances described above. Under the Bureau's proposal, a financial institution would not have been required to collect ethnicity and race via visual observation and/or surname if the applicant provided *any* demographic information regarding *any* principal owner. For applicants with multiple principal owners, the financial institution may not be able to determine whether the applicant had provided the demographic information of the principal owner who met in person with the financial institution or for another principal owner. The Bureau sought comment on this proposed approach. The Bureau also sought comment on whether a financial institution should be required to collect a principal owner's ethnicity and/or race via visual observation and/or surname if the applicant has only one principal owner, the applicant does not provide all of the principal owner's requested demographic information, and the financial institution meets in person with the principal owner. The Bureau noted that in this situation, the financial institution would be able to ''match'' any demographic information that the applicant provides with the correct principal owner because there is only one principal owner.

Proposed comment 107(a)(20)–9 would have explained that a financial institution would be required to report ethnicity and race based on visual observation and/or surname in certain circumstances. It would have further explained that a financial institution would not be required to report based on visual observation and/or surname if the principal owner only meets in person with a third party through whom the applicant is submitting an application to the financial institution.

Proposed comment 107(a)(20)–10 would have clarified that a financial institution meets with a principal owner in person if an employee or officer of the financial institution or one of its affiliates has a meeting or discussion with the applicant's principal owner about an application and can visually observe the principal owner. The proposed comment would have also provided examples of situations where the financial institution meets in person with a principal owner and where it does not. The Bureau requested comment on this approach and whether there should be additional or different examples.

Proposed comment 107(a)(20)–11 would have clarified that a financial institution uses only aggregate categories when reporting ethnicity and race based on visual observation and/or surname and would have directed financial institutions to proposed appendix G for additional information on collecting and reporting ethnicity and race based on visual observation and/or surname. The Bureau requested comment on whether to permit, but not require, financial institutions to use the disaggregated subcategories as well when reporting ethnicity and race based on visual observation and/or surname.

In addition to the specific matters identified above, the Bureau sought comment on its proposed approach to this data point, the proposed methods of collecting and reporting the data, and on whether additional clarification regarding any aspect of this data point is needed.

Comments Received—Collecting Ethnicity and Race via Visual Observation or Surname in Certain Circumstances

General comments. The Bureau received comments from many banks, trade associations, community groups, members of Congress, small business owners, service providers, and others on its proposal that financial institutions be required to collect at least one principal owner's ethnicity and race on the basis of visual observation and/or surname under certain circumstances. A community group, a joint letter from community and business advocacy groups, and a CDFI lender supported the proposed requirement, emphasizing that demographic data collection via visual observation and surname analysis has been required by Regulation C for many years. The community group also commented that ethnicity and race information, including information collected via visual observation and/or surname as proposed, will allow data users to assess how the experiences of small businesses differ by approximate amount of minority ownership in the

[761] Small Bus. Admin., *Paycheck Protection Program Weekly Reports 2021, Version 11,* at 9 (effective Apr. 5, 2021), *https://www.sba.gov/sites/default/files/2021-04/PPP_Report_Public_210404-508.pdf.* Paycheck Protection Program data were taken from 2021 loans for which the collection form for principal owner demographics was included in the application itself and, for most of that time, was featured on the first page of the application.

business, particularly when combined with information about an applicant's number of principal owners under proposed § 1002.107(a)(21).

Many commenters objected to the proposed requirement. A number of industry commenters stated that the Bureau should require only the reporting of applicant-provided data. A number of agricultural lenders, a trade association, a service provider, a community group, and a business advocacy group stated that while they support the collection of demographic information and the need for robust data, they do not support the proposed requirement. A few industry commenters said that the Bureau should only require best efforts to collect demographic information.

Use of visual observation and surname to collect sex. A number of commenters, including banks, trade associations, community groups, and LGBTQI+ advocacy groups, supported the Bureau's proposal to not require the use of visual observation and/or surname to report a principal owner's sex. Several LGBTQI+ advocacy groups commented that visual observation of the gender expression of principal owners would inevitably rely upon sex stereotypes and lead to inaccurate determinations of sex, gender identity, or sexual orientation. A community group similarly stated that it would not be possible in some cases to use visual observation to accurately identify gender. Several industry commenters stated that requiring financial institutions to determine the sex of principal owners would make employees uncomfortable and potentially offend applicants who had declined to provide this information.

In contrast, some banks requested that the visual observation and surname requirement for this rule be aligned with Regulation C and thus apply to data on sex as well as for ethnicity and race. These commenters said that alignment with Regulation C would reduce reporting errors and financial institutions' compliance burden because financial institutions would not need to use additional resources to understand and implement different data collection requirements.

Data accuracy and related concerns. Many commenters, including a range of lenders, trade associations, community groups, several members of Congress, business advocacy groups, and others, were concerned that the proposed requirement would yield unreliable ethnicity and race data.

Some commenters argued that such a requirement would introduce error, bias, and subjectivity into the data collection process, leading to inaccurate or distorted data. Several said that such purported bias should not be part of the underwriting process or that section 1071 was intended to combat this type of bias. One commenter said that banks do not consider the ethnicity, race, or gender of small business applicants and argued that they should not be required to guess such information. Other commenters asserted that inaccuracies in the collected data would not support rigorous analysis, would not serve the purposes of section 1071, and would be inconsistent with congressional intent to collect reliable data on small business credit. Several other commenters similarly stated that data collected via visual observation or surname would impair analyses, conclusions, and policies based on such data.

Several commenters asserted that data collected pursuant to the proposed requirement would be inaccurate because the process would be based on or encourage the use of racial stereotypes or assumptions. Several other commenters asserted that ethnicity and race determinations made by visual observation have been prone to error or unreliable, with some citing materials on own-race bias, other-race effect, and similar issues. Some commenters predicted that the proposed requirement may cause some lenders to rely on surname alone to avoid determining ethnicity and race based on visual observation. Others said that the proposed requirement should not be finalized because it could risk perpetuating discrimination and insert racial stereotyping into application processes, posing risks to applicants and financial institutions alike. A community group stated that the proposed data collection method raises fair lending concerns. With respect to reporting ethnicity and race based on surname, several commenters asserted that surname analysis was unreliable and obsolete.

Commenters also identified specific circumstances that they said could lead to inaccurate ethnicity and race determinations based on visual observation and surname. Some commenters argued that the provision does not account for situations such as adoption, surname changes, and multi-ethnic or multi-racial identities. Other commenters alleged that visual observation and surname analysis would likely be inaccurate or unreliable as a result of increasing demographic diversity. Several asserted that racial and ethnic identities are personal, influenced by a number of different factors, and should be confirmed only by the applicant. Another commenter likewise stated that the Bureau should only require lenders to report based on applicant-provided data to promote accuracy and inclusivity. Several commenters noted that a principal owner's ethnicity and race could be reported differently by different lenders under the proposed requirement.

Some commenters said that loan officers and bank employees lack the expertise or training to make ethnicity and race determinations, and that the proposed requirement would lead to guessing. Another commenter said the proposed requirement would create training and other employment hurdles without producing meaningful information.

Several commenters noted that the proposed requirement would result in inaccurate data when the person filling out the application is not a principal owner of the business, but rather an employee. Commenters also asserted that data would be misleading when the ethnicity and race of the principal owner meeting with the bank is not representative of the other principal owners of the business. One commenter asserted that the proposed requirement could subject lenders to liability because they do not always interact with principal owners.

Some commenters opposed the proposed requirement on the grounds that data collected using this method would be, they said, generally unrepresentative of small business applicants. They predicted low response rates to inquiries about ethnicity and race for this rule, based on the experience of the Paycheck Protection Program, and argued that ethnicity and race data would be based on visual observation and surname analysis for a disproportionate number of applications, which these commenters posited would result in inaccurate data. Several commenters stated that, as a result, inaccuracies attributable to the use of visual observation and surname analysis would be magnified, making the data collected unrepresentative of the applicant population and not useful for any analyses. Others commented that ethnicity and race data reported based on visual observation or surname would be both inaccurate and unrepresentative because of the increased use of digital application processes with no visual component. A trade association anticipated low applicant response rates to the demographic questions based on its members' experience that customers express anger or are reluctant to provide ownership information as required by FinCEN's customer due diligence rule. This commenter expected that applicants would not want to provide demographic information due to concerns that it would be used in the credit process, despite any assurances to the contrary on the sample data collection form.

Customer relationships. Many commenters asserted that the proposed requirement would impair customer relationships, citing small business lending as more relationship-dependent than other forms of credit. A number of commenters stated that it would make bank employees and applicants uncomfortable, with some suggesting specifically that this could occur when in-person applicants witness employees filling out demographic information that the applicants declined to provide. A number of commenters likewise said it would negatively impact customer relationships. One argued that because banks are more likely to have ongoing interactions with a small business owner than someone seeking a mortgage, offense taken from visual observation or surname analysis would be more detrimental.

Several agricultural lenders expressed concern that the disclosure on the proposed sample data collection form informing applicants about the obligation of lenders to report ethnicity and race information through visual observation and/or surname analysis would be negatively received by applicants, stating that applicants might perceive the notice as an indication that the lender intends to or must contradict the applicant's wishes. A trade association suggested that applicants would feel uncomfortable providing their demographic information if they receive notice that such information would not be subject to a firewall, which would lead to a greater use of visual observation and surname analyses.

Right to refuse. A range of commenters opposed the proposal on the grounds that applicants have a right to decline to provide demographic information. One commenter said that the proposed requirement would further damage the public's confidence in financial institutions and heighten privacy concerns, because it would contradict an applicant's decision to not provide the requested information. Several cited the high percentage of Paycheck Protection Program loan applicants that did not report demographic data as showing applicant concerns about privacy and the importance of voluntary reporting.

Some commenters stated that the proposal is inconsistent with, or that it inappropriately circumvents, section 1071's provision that an applicant may refuse to provide protected demographic information and urged the Bureau to respect that right. One commenter said that section 1071 is structured to require financial institutions to make inquiries for their customers' information and to allow applicants to refuse to provide such information; given this framework, the commenter questioned whether requiring collection would be permissible under the statute when an applicant has already refused to provide the information. One commenter said that applicants may not understand that if they decline to answer demographic inquiries that lenders will determine and report their ethnicity and race anyway. Several commenters highlighted that HMDA, in contrast to section 1071, does not provide a comparable right of refusal.

Burden and cost. A few commenters objected to the proposed requirement on the grounds that it would impose significant costs on some lenders. One commenter identified costs to create and maintain policies and procedures, apply these consistently, conduct ongoing training, and audit compliance, while another said the proposal would require substantial changes to its loan processes, systems, and compliance protocols to implement. A commenter said that reliance on proxying, inference, or visual observation would impose a number of cost and compliance concerns. Several commenters asserted that lenders may face substantial costs to train employees to make determinations; one said this training could be complex for front-line employees who are currently taught that ECOA and other laws prohibit the collection of ethnicity and race information. A CDFI lender stated that the proposed requirement would impose less burden on larger banks and online lenders, either because they will have a higher number of online loan applications or because they already report demographic information on the basis of visual observation and surname under HMDA.

Response rates. Several commenters disputed that the higher responses rates in HMDA data, compared with lower response rates in Paycheck Protection Program data, could be attributed to HMDA's visual observation and surname requirement, and also disputed that this proposed requirement could improve response rates for financial institutions complying with the small business lending rule. Some suggested that the Bureau's concern with low response rates based on the Paycheck Protection Program experience is misplaced, arguing that those response rates were attributable to the program's emergency nature, and the rush by all parties to submit and process applications. Commenters also noted that Paycheck Protection Program may not inform the likely response rates under this rule because that program covered a wider range of businesses than the Bureau's proposal.

Purported conflicts with ECOA and Regulation B. Some commenters raised concerns about conflicts between the proposed requirement and subpart A of Regulation B and ECOA. One commenter stated that the proposed requirement is prohibited by 12 CFR 202.5, which provides that a creditor may not inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction. Several commenters said that the proposed requirement would require bank employees to consider factors that ECOA prohibits creditors from considering. Commenters also generally stated that the proposed requirement conflicts with the fair lending training provided to bank employees and will insert race as a factor in the credit application process.

Several commenters said that a visual observation and surname requirement would not align with, or would violate, the statutory firewall requirement, noting that the lenders would have to determine a borrower's ethnicity and race but then have to "forget" and isolate the information when making credit decisions. One requested that information collected via visual observation and/or surname not be subject to the firewall provision because of the difficulty in maintaining the firewall requirements for data collected this way.

In-person meetings. A number of commenters raised concerns that the proposed requirement would damage the relationships that community banks, traditional banks, or small- to mid-sized banks have with their customers. One asserted that in-person interactions are important for community lenders, such as CDFI banks, to understand customers, to make customers feel comfortable, and to identify products and services responsive to the needs of lower income and other underserved communities. Others emphasized that such lenders value and rely on repeated, in-person interactions with customers, saying that the proposed requirement would disproportionately affect them, but would favor large banks and online lenders that did not see applicants and thus would not have to employ the visual observation or surname analysis. One commenter suggested that all lenders should be subject to the proposed requirement, because online lenders can still conduct surname analyses. Another said that the proposed requirement would disproportionately subject CDFI lenders to the risks of reporting inaccurate data, including reputational damage, and greater operational and compliance burden. A commenter urged that the Bureau exempt community banks from the proposed requirement.

In contrast, some commenters suggested that the proposed requirement would not generate much data as a result of a shift away from in-person interactions, thus limiting or negating its value. One such commenter predicted that much small business lending will likely be through credit cards, which it said would not provide an opportunity to implement the requirement, and as a result data collected via visual observation and surname would be associated with certain loan types that may be received by higher revenue applicants.

Some commenters suggested that lenders, their employees, and applicants would try to avoid visual observation and surname analysis. Several said that the proposed requirement would discourage loan officers and applicants from meeting in person or by video call. Others stated that some banks may shift applications online, impairing the personal interaction some banks have with their communities. One commenter predicted that the proposed requirement would discourage small business applicants from seeking credit.

Another commenter argued that the proposed requirement is unnecessary because financial institutions do not always meet with the principal owners of a business. Several commenters said that ethnicity and race determinations from visual observation and surname analysis may not be representative of the applicant population, would be inconsistent, and would not be comparable to other data.

One commenter said that the requirement would be difficult to apply because a financial institution may not know if the principal owner's demographic information had already been collected to assess if the visual observation and surname requirement applies, such as in the context of a brief interaction that is later determined to be an in-person meeting that would trigger the proposed requirement. Others asked for clarity on whether the proposed requirement would be triggered if any bank employee met in person with a principal owner, even if not involved with the credit application (for example when signing closing documents). Another commenter stated that financial institutions should not be required to determine if an individual is a principal owner, a necessary condition to collect data on a principal owner's ethnicity and race via visual observation and surname analysis, if the small business applicant chooses not to disclose its ownership structure.

Litigation and compliance risk. Some commenters were concerned that the proposed requirement would subject financial institutions and their employees to enforcement actions or litigation if they erred in determining a principal owner's ethnicity or race. Several stated that despite good faith efforts, such errors could subject lenders to examiner scrutiny, litigation, negative media, and erroneous discrimination claims by third parties, or subject them to customer complaints. One commenter stated that regulators could use financial institutions' best-guess, but erroneous determinations to pursue disparate impact cases, or customers could bring discrimination cases, if they are able to reverse engineer the inadvertently incorrect ethnicity or race determinations made by financial institutions. A community group suggested that financial institutions would avoid reporting ethnicity or race at all to avoid litigation risk.

Several business advocacy groups suggested that certain lenders may use this provision to fabricate ethnicity and race data in order to make their lending practices appear more equitable, accessible, and unbiased.

Implementation and other comments. A number of commenters offered specific suggestions regarding particular aspects of the proposal, notwithstanding other objections they may have raised regarding whether it should be finalized at all. Several urged the Bureau to provide guidance materials and sample disclosures, and to engage in education efforts to encourage applicants to self-report their demographic information, with some suggesting these options in place of the proposed provision. Some said the Bureau should develop guidance that lenders could use to avoid questions of interpretation and to learn about resources they can use to make ethnicity and race determinations on the basis of a principal owner's surname. Several suggested that the Bureau provide a uniform surname classification standard.

One commenter requested an exemption from the proposed requirement (and the collection of ethnicity and race generally) for retail credit, on the grounds that many applicants will decline to provide demographic information about their principal owners given the sensitivity of the information. Other commenters stated that automobile and truck dealers had expressed concerns about the proposed requirement and did not think it would be possible to report detailed demographic information based on visual observation. Another commenter recommended that the Bureau exempt sole proprietors from the proposed requirement, noting that sole proprietor transactions are unique and may not provide meaningful data on the commercial credit market served by small, non-bank lenders.

Several commenters opposed the proposed requirement, arguing that the use of visual observation and surname is outdated. Two commenters stated that these methods employed in Regulation C were implemented many years ago, and that the Bureau should follow more current government agency practices, citing a 2021 policy memo from USDA [762] rescinding the use of visual observation to determine ethnicity or race for certain Federal food programs. One commenter stated that, as with participants in the USDA programs, some small business owners may not want their ethnicity or race determined by others, may perceive discriminatory treatment, and may avoid applying for credit.

One commenter stated that the scope of the proposed requirement was unclear, noting that the NPRM preamble and proposed commentary provided that a financial institution would have to identify at least one principal owner by visual observation or surname if the applicant does not provide the ethnicity and race of at least one principal owner, even though institutions are obligated to collect the ethnicity, race, and sex of each of the small business applicant's principal owners. Several commenters requested that financial institutions should only be required to collect aggregate ethnicity and race categories.

One commenter suggested the use of an automated proxy analysis of surnames as an alternative to the proposed requirement. Another said that the Bureau could determine ethnicity and race with the data reported by lenders based on surname analysis.

Several commenters urged that, if the proposed requirement is finalized, demographic data should note when they are collected via visual observation or surname.

[762] U.S. Dep't of Agric., *Collection of Race and Ethnicity Data by Visual Observation and Identification in the Child and Adult Care Food Program and Summer Food Service Program—Policy Recission* (May 17, 2021), *https://www.fns.usda.gov/cn/Race-and-Ethnicity-Data-Policy-Rescission.*

Final Rule—Collecting Ethnicity and Race via Visual Observation or Surname in Certain Circumstances

The Bureau is not finalizing its proposed visual observation and/or surname analysis requirement for the reasons set forth below. Final § 1002.107(a)(19) (proposed as § 1002.107(a)(20)) no longer includes references to the reporting of ethnicity and race based on visual observation and surname. The Bureau is likewise not adopting proposed comment 107(a)(20)–9, regarding reporting based on visual observation and/or surname; proposed comment 107(a)(20)–10, regarding meeting in person with a principal owner; and proposed comment 107(a)(20)–11, regarding the use of aggregate categories when reporting using visual observation or surname. The Bureau has also removed other references to the collection of ethnicity and race data via visual observation and/or surname from other locations in the final rule.

In making this decision, the Bureau carefully considered the numerous comments it received, the statute, the history of the use of visual observation and surname analysis under HMDA, and the recent history of the collection of demographic information related to the Paycheck Protection Program. The Bureau believes, based on its expertise and the longstanding use of visual observation and surname analysis in HMDA, that collection of demographic information via visual observation or surname analysis has the capacity to improve response rates for demographic information—without particular risk to data accuracy,[763] introduction of bias or racial stereotyping into the underwriting process,[764] increased litigation/compliance risk, or violations of existing ECOA/Regulation B,[765] as suggested by some commenters. The Paycheck Protection Program experience also suggests that there may be benefits in such a requirement.

Nonetheless, the Bureau believes that a requirement to collect principal owners' ethnicity and race via visual observation or surname could pose particular challenges for small business lending that are not present in mortgage lending. For example, applicants and co-applicants are clearly identified as such in mortgage applications—making it obvious whose demographic information has, or has not, been self-reported. In contrast, this final rule—as mandated by section 1071—requires a record of the applicant's responses to a request for protected demographic information to be kept separate from the application, and prohibits inclusion of personally identifiable information in records compiled and maintained pursuant to this rule. This could make tracking whose information has, or has not, been self-reported by the applicant particularly challenging. As commenters pointed out, a financial institution might be interacting with a representative of a small business who is not a principal owner, or the institution may not know—particularly early in the application process—if a particular person is a principal owner.

In addition, the Bureau is mindful, consistent with the comments it received, that much of the lending to small businesses in smaller communities and in underserved and rural areas occurs through relationship banking that involves more frequent and more personal contact with applicants. The Bureau is also mindful of concerns raised by lenders that rely on in-person engagement that their customer relationships may be negatively impacted by customer discomfort with a visual observation and surname data collection requirement, particularly during initial implementation of this final rule. The Bureau also acknowledges the concerns expressed by commenters that bank employees may feel uncomfortable making ethnicity and race determinations on the basis of visual observation or surname. On the other hand, the Bureau acknowledges comments that the prevalence of online lending processes and use of credit cards in small business lending could mean few opportunities for in-person or video-enabled meetings and thus for the collection of ethnicity and race via visual observation or surname.

The Bureau's decision not require financial institutions to collect principal owners' ethnicity and race information via visual observation or surname at this time renders moot the comments about implementation of such a requirement, as well as those suggesting alternatives to the proposal.

The Bureau intends to actively monitor financial institutions' response rates to inquiries regarding demographic data to ensure that applicants are not being discouraged in any way from providing their demographic data pursuant to this final rule and to determine whether any future adjustments to the rule may be warranted.

107(a)(20) Number of Principal Owners

Proposed Rule

Proposed § 1002.107(a)(21) would have required financial institutions to collect and report the number of the applicant's principal owners. Proposed comment 107(a)(21)–1 would have explained that a financial institution would be able to collect an applicant's number of principal owners by requesting the number of principal owners from the applicant or by determining the number of principal owners from information provided by the applicant or that the financial institution otherwise obtains. If the financial institution asks the applicant to provide the number of its principal owners, proposed comment 107(a)(21)–1 explained that the financial institution would have been required to provide the definition of principal owner set forth in proposed § 1002.102(o). The proposed comment also clarified that, if permitted pursuant to proposed § 1002.107(c)(2), a financial institution could report an applicant's number of principal owners based on previously collected data.

Proposed comment 107(a)(21)–2 would have clarified the relationship between the proposed requirement to collect and report the number of principal owners in proposed § 1002.107(a)(21) with the proposed requirement to report verified information in proposed § 1002.107(b). The proposed comment would have stated that the financial institution may rely on an applicant's statements in collecting and reporting the number of the applicant's principal owners. The financial institution would not have been required to verify the number of

[763] While some commenters suggested that data inaccuracies from visual observation and surname analysis would have limited the usefulness, integrity, reliability, or quality of the collected data and conclusions or policies based upon the data, the Bureau has not found this to be the case in HMDA and would not expect it to be so here either. A loan officer reporting their perception of an applicant's ethnicity and race could not do so ''incorrectly'' (other than by intentionally mis-reporting their perception); in fact, a loan officer's perception of an applicant's protected demographic information may be more important for fair lending analyses than how the applicant self-identifies.

[764] Collecting lenders' perceptions of the ethnicity and race of applicants, whether or not such perceptions are what the applicant would consider ''accurate,'' could have enabled an analysis of potential bias by lenders. But the mere recordation of those perceptions is unlikely to create bias on the basis of those perceptions.

[765] Inquiring about an applicant's ethnicity and race (or collecting such information via visual observation or surname, if the Bureau were finalizing that aspect of the proposal) will not, in fact, violate Regulation B's prohibition on inquiring about certain protected characteristics of an applicant in connection with a credit transaction, nor is doing so under HMDA/Regulation C a violation. Regulation B implements ECOA, of which section 1071 is a part. Section 1002.5 of Regulation B, and its amendments under this final rule, make clear that the collection of ethnicity and race pursuant to this rule would not violate Regulation B.

principal owners provided by the applicant, but if the financial institution did verify the number of principal owners, then the financial institution would report the verified number of principal owners.

Proposed comment 107(a)(21)–3 would have stated that pursuant to proposed § 1002.107(c)(1), a financial institution would be required to maintain procedures reasonably designed to collect applicant-provided information, which includes the applicant's number of principal owners. However, the proposed comment would have explained that if a financial institution is nonetheless unable to collect or determine the number of principal owners of the applicant, the financial institution would report that the number of principal owners is ''not provided by applicant and otherwise undetermined.''

In addition to seeking comment on its proposed approach to the collection and reporting of the number of principal owners generally, the Bureau also sought comment on whether to instead, or additionally, require collection and reporting of similar information about owners (rather than principal owners). The Bureau raised, as an example, whether financial institutions should be required to collect and report the number of owners that an applicant has that are not natural persons.

Comments Received

The Bureau received comments on this aspect of the proposal from a number of lenders, trade associations, and community groups. Two lenders and a community group supported the Bureau's proposal for collecting and reporting the number of an applicant's principal owners. The community group stated that the information would help determine whether experiences in the small business lending marketplace are different if an owner is a woman or minority, even if a small business does not meet the criteria for a minority-owned or women-owned business. Further, knowing the number of a business's principal owners would help data users identify businesses with varying percentages of ownership by women or minorities above or below the 50 percent threshold for minority-owned or women-owned businesses. One lender stated that the number of principal owners data point, along with others proposed by the Bureau, would provide insight on the quality of capital being accessed by small businesses, assist in showing how financial institutions compare across different metrics, and help determine if an institution is engaged in equitable lending. This commenter also stated that in its experience, there are a number of small business lending programs and funding opportunities that require similar data. Thus, this commenter stated its expectation that the reporting requirements in the Bureau's final rule would satisfy requirements across a number of such programs and reduce administrative burden. Specifically, the commenter noted that it had gathered similar data on owners for Paycheck Protection Program loans it originated.

A number of lenders and trade associations opposed the Bureau's proposal to collect information about the number of an applicant's principal owners. Two such commenters stated that the information does not serve the purposes of section 1071, unless it is to allow second guessing of applicant-provided responses as to their minority-owned or women-owned status or the Bureau intends to require the collection of ethnicity, race, and sex data for all of an applicant's principal owners. One bank stated that the proposed number of principal owners data point would not offer any insight into lending patterns, as it is not considered in the underwriting process. Another bank argued that the data point is not necessary because there is no evidence that lenders use an applicant's number of principal owners as a basis for discrimination. One bank questioned the benefit of collecting such information, stating that a business's ownership and principals may change on a day-to-day basis. Another commenter stated that the information collected may inadequately or erroneously describe an applicant's ownership structure, particularly where the legal structure of the applicant's ownership may make such determinations difficult. Several commenters also stated that the data point is unnecessary, because similar information is already collected in other contexts (such as under FinCEN's customer due diligence rule) and regulators already examine banks for fair lending compliance.

Several commenters cited costs and burden as the basis for their objections. Two banks stated that it would be expensive to collect the information, with one also noting that the costs would be passed down to customers and communities. Another bank stated that because it does not collect information about the number of an applicant's principal owners currently, the proposed requirement would entail changes to its operating procedures and suggested that the Bureau could obtain this information from the Internal Revenue Service instead. With regard to indirect vehicle financing transactions, a trade association stated that information about the number of principal owners is not part of the data transmitted between dealers and finance companies and is not used for business purposes, thus technical and process changes would be needed to collect and report the data.

A few industry commenters objected to the collection and reporting of the number of an applicant's principal owners on the basis of privacy, stating that the data point could be used to identify applicants. One said that this concern was particularly relevant for small communities with limited numbers of small businesses. Two others urged the Bureau to not publish the data point publicly to protect applicants' privacy.

An agricultural lender said it was unclear how financial institutions should report the number of principal owners for family farmers. This lender emphasized that the ownership of many family farm businesses is complex and may involve multiple business entities for risk management purposes, with separate entities for different farm operations. The commenter provided as an example a situation where a person owns only one farm parcel but works several farm parcels that are owned by a parent through multiple business entities and trusts.

Some industry commenters objected to this proposed data point as part of their general objection to the Bureau's data points proposed pursuant to ECOA section 704B(e)(2)(H). These commenters generally argued that such data points, including the number of an applicant's principal owners, do not add value or advance the purposes of achieving fair lending or of ECOA; are not used or collected for underwriting or financial analysis; go beyond what other laws require financial institutions to collect; add unnecessary complexity and detail to the rule; and would add to the burden and costs for implementing the rule, especially for small covered financial institutions.

Two industry commenters objected to the data point on the grounds that in the absence of other information about an applicant's ownership, such as the number of owners or percentages of ownership, the information could lead to incorrect assumptions about the ownership structure of a small business applicant. For example, the commenters noted that if demographic data are reported for one individual, it could lead to a conclusion that the applicant has only one principal owner, when the applicant has several owners, but only one with more than a 25 percent ownership share.

Two commenters urged the Bureau to provide a regulatory safe harbor for reporting information about an applicant's number of principal owners, as part of a global safe harbor for all applicant provided data, or a safe harbor similar to that in proposed § 1002.112(c).

Several community groups suggested additional data points related to ownership. One such commenter suggested that the Bureau require financial institutions collect and report the percentage amount of a principal owner's ownership. This information, argued the commenter, would enable the Bureau to refine its data and reveal specific disparities in lending by ownership composition. Another commenter suggested that the Bureau require financial institutions to ask applicants for the number of individuals who own less than 25 percent of the applicant, to provide more insight on the distribution of small businesses and their experiences. One other commenter instead suggested that the Bureau add additional data points to measure the percentage of ownership by women and by people of color, to further enable evaluations of access to credit based on the proportion of ownership and control by such individuals.

A joint letter from community and business advocacy groups requested that the Bureau clarify proposed comment 107(a)(21)–3, which stated that if a financial institution is unable to collect or ''otherwise determine'' an applicant's number of principal owners, the financial institution should report it as unknown. The community groups asked the Bureau to clarify the meaning of the phrase ''otherwise determine,'' and specifically whether financial institutions may limit its investigation to documents obtained from the applicant in the normal course of an application, or if they have an obligation to conduct a due diligence investigation of corporate records.

Final Rule

For the reasons set forth herein, the Bureau is finalizing the requirement for financial institutions to collect and report the number of an applicant's principal owners, renumbered as § 1002.107(a)(20), and its associated commentary. In consideration of the comments received, the Bureau is doing so pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071 and under ECOA section 704B(e)(2)(H), which authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].''

The Bureau believes that the information will provide important context for other information collected and reported under the rule and thus serve the purposes of section 1071. The Bureau acknowledges that, as argued by commenters, the number of an applicant's principal owners may not be information considered by financial institutions in the underwriting process or, by itself, serve as the basis of discrimination. However, as noted by other commenters, information about the number of small businesses' principal owners will help data users, including the Bureau, understand how small business applicants' experiences in the lending marketplace differ on the basis of the demographic composition of their ownership and identify business and community development needs and opportunities. Thus, even if an applicant is not a women-owned, minority-owned, or LGBTQI+-owned business under § 1002.107(a)(18), through the number of principal owners data point, data users will still have some insight into what proportion of the small business's ownership has the demographic characteristics provided by the applicant.

The Bureau acknowledges some commenters' concerns that the number of principal owners data point would not provide a comprehensive picture of an applicant's ownership structure. Final § 1002.102(o) defines a principal owner as an individual who directly owns 25 percent or more of the equity interests of a business. As a result, the requirement to collect information about the number of an applicant's principal owners will not account for individuals with either indirect ownership or less than 25 percent ownership in the business. However, the Bureau believes that this supports, rather than counsels against, inclusion of this data point in the final rule.

The Bureau also is not adding other data points related to ownership to the final rule. The Bureau considered the general likelihood that an individual responding for the applicant would know the information being requested in formulating its proposal. The Bureau believes that applicants are likely to know the number of its principal owners and will be willing to provide that information. Overall, the Bureau believes that the number of principal owners data point, particularly in combination with information about an applicant's business statuses under § 1002.107(a)(18), strikes a balance so that the Bureau is likely to receive useful data that will allow it and others to develop a nuanced understanding of small business lending practices generally, even if it does not present a complete picture of each applicant's ownership structure.

The Bureau does not believe that the fact that some applicants have complicated ownership structures necessitates removal of this data point from the final rule. Although some small business applicants, such as family farmers, may have ownership structures where there are many owners and/or where ownership is through various business entities, the rule's definition for principal owner means that applicants would be required to identify only individuals, and not entities or trusts, with direct ownership in the business and would not need to trace ownership through multiple business entities or provide information about individuals with small equity shares in the business. Under comment 107(a)(20)–1, this definition would be provided to an applicant in conjunction with the request for the number of its principal owners. The Bureau believes that the straightforward definition in § 1002.102(o) will assist applicants in providing this information.

Further, the Bureau believes the information about the number of an applicant's principal owners will be useful and facilitate the purposes of section 1071, even if a specific applicant's ownership changes over time. Under the Bureau's proposal, as with the final rule, applicants are asked for information in relation to individual, covered applications to allow data users, in the aggregate, to ascertain lending patterns at the institution or community levels. The data meets the final rule's purposes if it is accurate at the time the data are collected. Identifying changes in ownership over time will also further the business and community development and fair lending purposes of section 1071.

Some commenters suggested that the number of principal owners data point should not be required under the final rule because similar information is collected in other contexts. However, the definition of principal owner under § 1002.102(o) has been specifically tailored by the Bureau to meet the purposes of section 1071. Information about differently defined owners under different regulatory regimes, reported to other regulatory authorities, does not facilitate section 1071's purposes of fair lending enforcement and identification of business and community development needs and opportunities, nor could such data be matched to a particular covered application reported under section 1071.

With respect to commenters' arguments that the additional burden and costs that would result from the number of principal owners data point warrant its removal from the final rule, the Bureau notes first that commenters did not identify any specific costs or burdens with reporting the number of principal owners data point in particular, as much as concern about the costs and burden of reporting data points adopted pursuant to the Bureau's statutory authority in ECOA section 704B(e)(2)(H) generally. The Bureau acknowledges that financial institutions will experience some initial expenses and burden in implementing new regulatory data collection requirements. However, the Bureau understands that financial institutions already collect and maintain information about the ownership of certain businesses under FinCEN's customer due diligence rule. The Bureau does not believe that there will be significant costs and burden associated with collecting and reporting information about applicants' principal owners specifically, as opposed to generally as part of a new data collection regime. The Bureau considers the data points it is adopting pursuant to section 704B(e)(2)(H)—including the number of an applicant's principal owners and the corresponding costs and burden to implement their collection—necessary to facilitate the purposes of section 1071.

The Bureau does not believe that a specific safe harbor is necessary for reporting the number of an applicant's principal owners, as urged by commenters. As provided in final comment 107(a)(20)–2 (proposed as comment 107(a)(21)–2), a financial institution is entitled to rely on the statements provided by the applicant in collecting and reporting the information provided by the applicant. As a result, any such good faith reporting by a financial institution of the number of an applicant's principal owners that the financial institution has no reason to believe is inaccurate will not be a violation of the regulation's requirements.

In response to commenters' concerns that information about an applicant's number of principal owners may be used to identify applicants, the Bureau will review the data received to complete the full privacy analysis to determine the privacy risks associated with the publication of the application-level data as discussed in part VIII, below. The Bureau takes the privacy of such information seriously and will be making appropriate modifications and deletions to any data before making it public.

With respect to commenters' request that the Bureau clarify financial institutions' obligation to determine the number of an applicant's principal owners, the Bureau believes that the proposed commentary is sufficiently clear and does not need to be revised. The Bureau's intent in proposed comment 107(a)(21)–3 that a financial institution report that the number of principal owners is "not provided by the applicant and is otherwise undetermined" was to refer to the possibility that a financial institution may not know the number of the applicant's principal owners if, despite maintaining reasonably designed procedures to obtain the information, the applicant does not provide the information and the financial institution does not otherwise verify such information. The Bureau has also revised comment 107(b)–1 to clarify what information may be used to verify information. Given these other statements in the commentary, the Bureau does not believe that further clarification of financial institutions' obligation to determine the number of an applicant's principal owners is necessary.

As explained in the section-by-section analysis of § 1002.102(o), the Bureau has changed the definition of principal owner to use the term "individual" instead of "natural person" for comprehensibility reasons. Accordingly, the commentary for final § 1002.107(a)(20) has likewise been updated to refer to individuals and not natural persons.

To streamline the commentary, the Bureau has revised comment 107(a)(20)–1 (proposed as 107(a)(21)–1) to remove the first sentence as to requesting the number of an applicant's principal owners from the applicant or determining such information from other information, as duplicative of content in comment 107(b)–1, which applies to the number of principal owners data point. For similar reasons, it has removed the last sentences of comments 107(a)(20)–1 and –2, regarding the use of previously collected data and about verification, as straightforward applications of final § 1002.107(d) and (b), respectively, that would not provide any new content. Otherwise, the Bureau is substantially finalizing the commentary for § 1002.107(a)(20) with changes to reflect updated numbering for the data point and also updating and adding cross-references to other parts of the final rule.

107(b) Reliance on and Verification of Applicant-Provided Data

Proposed Rule

ECOA section 704B(e)(1) provides that "[e]ach financial institution shall compile and maintain, in accordance with regulations of the Bureau, a record of the information provided by any loan applicant pursuant to a request under [section 704B(b)]." [766] Section 1071 does not impose any requirement for a financial institution to verify the information provided by an applicant.

During the SBREFA process, a number of small entity representatives urged the Bureau to require collection and reporting of a number of data points based only on information as provided by the applicant.[767] No small entity representatives stated that they thought verification should be generally required. The industry stakeholders who commented on this issue asked that the Bureau not require verification of applicant-provided information. The Bureau did not receive any comments on this issue from community group stakeholders during the SBREFA process.

The Bureau proposed in § 1002.107(b) that unless otherwise provided in subpart B, the financial institution would be able to rely on statements of the applicant when compiling data unless it verified the information provided, in which case it would be required to collect and report the verified information. The Bureau believed that requiring verification of collected data would greatly increase the operational burden of the rule. Proposed comment 107(b)–1 would have explained that a financial institution could rely on statements made by an applicant (whether made in writing or orally) or information provided by an applicant when compiling and reporting applicant-provided data; the financial institution would not be required to verify those statements. Proposed comment 107(b)–1 would have further explained, however, that if the financial institution did verify applicant statements for its own business purposes, such as statements relating to gross annual revenue or time in business, the financial institution would report the verified information. The comment would have gone on to explain that, depending on the circumstances and the financial institution's procedures, certain applicant-provided data could be

[766] ECOA section 704B(e)(1).

[767] SBREFA Panel Report at 26.

collected without a specific request from the applicant. For example, gross annual revenue could have been collected from tax return documents. In addition, the proposed comment would have made clear that applicant-provided data are the data that are or could be provided by the applicant, including those in proposed § 1002.107(a)(5) through (7), and (13) through (21).

The Bureau sought comment on its proposed approach to verification of the 1071 data points, including the specific guidance that would have been presented in comment 107(b)–1. The Bureau also sought comment on whether financial institutions should be required to indicate whether particular data points being reported have been verified or not.

Comments Received

The Bureau received comments on this aspect of the proposal from numerous lenders, trade associations, community groups, and a business advocacy group. Several lenders and trade associations supported the proposed provision, agreeing with the Bureau that requiring verification of collected data would greatly increase the operational burden of the rule. These commenters did not object to reporting verified information when a financial institution verifies applicant statements for its own business purposes. Several of these commenters did, however, object to the possible inclusion of a provision requiring financial institutions to flag whether or not they had verified reported data, a question that the NPRM had sought comment on. Although these commenters did not discuss reasons for objecting to the verification flag, the context suggests that they were concerned about the operational difficulty of carrying out such a provision.

Several banks and trade associations supported the ability to rely on unverified applicant-provided data, but objected to the requirement to report verified information when the financial institution verifies applicant statements for its own business purposes. Some of these commenters pointed out that verification may happen after the initial application, different lenders have different methods of verification, and updating the information for reporting would be operationally difficult. One of these commenters stated that the verification may be carried out by different staff using different platforms, and section 1071 does not mention verification. Other commenters suggested that the term ''verification'' was not sufficiently clear, and sometimes a financial institution would collect documents such as tax forms that contain information that conflicts with applicant statements, for example a different NAICS number, even though the financial institution is not ''verifying'' that data point. Other commenters expressed concern about how reporting information verified later would affect use of the ''firewall.'' A group of trade associations stated that collecting the verified information would provide little benefit and the already difficult implementation of the rule would be made even more onerous by this provision. In addition, one commenter stated that the verification provision was similar to HMDA, which they considered to be very onerous.

A community group and a women's business advocacy group suggested that the final rule should require additional verification. The community group stated that verification of a few key data points that are generally verified by lenders now, such as gross annual revenue, or that can be easily checked, such as the NAICS code, should be required. A business association urged the Bureau to look into ways to verify that the correct information is offered and reports are accurate.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(b) with additional language making clear that a financial institution may rely on information from appropriate third-party sources as well as the applicant, and other edits for clarity. Final § 1002.107(b) provides that unless otherwise provided in subpart B, the financial institution may rely on information from the applicant, or appropriate third-party sources, when compiling data. Section 1002.107(b) further states that if the financial institution verifies applicant-provided data, however, it shall report the verified information.

The Bureau is also finalizing associated comment 107(b)–1 with phrasing edits similar to those in the regulation text, and revised and additional cross-references to facilitate compliance. Final comment 107(b)–1 explains that a financial institution may rely on statements made by an applicant (whether made in writing or orally) or information provided by an applicant when compiling and reporting applicant-provided data; the financial institution is not required to verify those statements or that information. Comment 107(b)–1 further explains, however, that if the financial institution does verify applicant statements or information for its own business purposes, such as statements relating to gross annual revenue or time in business, the financial institution reports the verified information. The comment also makes clear that when collecting certain applicant-provided data, depending on the circumstances and the financial institution's procedures, a financial institution may collect and rely on information from appropriate third-party sources without requesting it from the applicant. The comment then provides further guidance on collection and verification of applicant-provided data, including a list of applicant-provided data points. In order to facilitate compliance, final comment 107(b)–1 also adds references to two comments that explain restrictions regarding verification of certain data points.

The Bureau believes that requiring verification of applicant-provided data points would greatly increase the operational burden of the rule, and that relying on applicant-provided data, whether directly from the applicant or through appropriate third-party sources, will ensure sufficient accuracy to carry out the purposes of section 1071. As explained above, section 1071 does not speak to verification; rather it refers only to compiling and maintaining a record of certain information provided by an applicant. However, the Bureau believes that requiring financial institutions to collect and report (for this final rule) information that they have already verified will only add slight operational difficulty, and will enhance the accuracy and usefulness of the data, thereby furthering the purposes of section 1071. The Bureau is implementing this requirement pursuant to its authority under ECOA section 704B(g)(1) to prescribe rules in order to carry out, enforce, and compile data pursuant to section 1071, and as an interpretation of the statutory phrase ''compile and maintain'' in ECOA section 704B(e)(1). In the Bureau's view, the fact that the statute does not use the specific word ''verification'' is not relevant to this issue because the verification that the financial institution chooses to carry out is a standard part of compiling and maintaining the information provided by the applicant. The Bureau also believes that this requirement will improve the quality and usefulness of the resulting dataset, thereby furthering the purposes of section 1071.

In regard to the possibility of the final rule requiring financial institutions to report whether or not certain data points have been verified, the Bureau notes that no commenters expressed support for this idea, while several opposed it.

The Bureau believes that such a requirement would impose considerable operational difficulty, and it is not clear that any uses of this information would justify the increased burden. Consequently, the final rule does not include this provision.

As discussed above, several commenters suggested that verification might occur at different times on different platforms and be carried out by different personnel. Although credit processing is complex, the Bureau anticipates that financial institutions will report data using the applicant's whole credit file in order to provide accurate information, as is done with HMDA. Although implementing the final rule so that verified information can be reported will add operational difficulty, such difficulty should be greatly reduced once the rule is implemented and the gathering of data is standardized within the financial institution. In addition, the fact that different financial institutions have different processes should not cause a problem because each financial institution can implement the rule to coordinate with its own processes. As explained above, the Bureau believes that requiring reporting of the verified information when the financial institution verifies for its own purposes will benefit data users in carrying out the purposes of section 1071 by enhancing the quality of the data reported.

Several commenters were concerned about how the term "verification" would be interpreted in relation to unused information in the credit file that might conflict with applicant-provided data. The Bureau interprets the word "verification" to mean the intentional act of determining the accuracy of information provided, in this case for the purpose of processing and underwriting the credit applied for, and potentially changing that information to reflect the determination. Loan file information that may or may not be more accurate than applicant-provided data and is not part of a financial institution's verification of the file's applicant-provided data or used by the institution in processing or underwriting the loan need not be reported. For example, a financial institution that uses a tax form to verify gross annual revenue, but does not consider or use the NAICS information on the tax form, may continue to rely on the applicant-provided NAICS information. However, if a financial institution believes the tax form information to be more accurate and chooses to report it instead of the applicant-provided data, it may do so.

The Bureau does not believe that requiring the reporting of data that is later verified will interfere with the final rule's firewall provision, which exists to protect against disclosure of protected demographic information for which verification is not allowed. For further discussion of the firewall provision see the section-by-section analysis of § 1002.108 below.

The Bureau does not believe it would be appropriate, as suggested by some commenters, require financial institutions to verify applicant-provided data when they do not already do so for their own business purposes. As stated by several commenters and explained above, requiring verification merely for the purpose of data collection would impose significant operational difficulty and expense on reporters.

107(c) Time and Manner of Collection

Proposed Rule

Although the definition of "application" triggers a financial institution's *duty* to collect 1071 data, the application definition does not necessarily govern *when* that data must be collected. The language and structure of section 1071—which applies to "applications" from "applicants"—indicates that the data must be collected sometime during the application process, but does not provide further detail.[768]

Proposed § 1002.107(c)(1) would have required a covered financial institution to maintain procedures to collect applicant-provided data under proposed § 1002.107(a) at a time and in a manner that is reasonably designed to obtain a response. The Bureau believed there would be benefits to providing a flexible approach concerning when applicant-provided data must be collected during the application process. Given the variety of application processes in the small business lending space, the Bureau believed that requiring data collection to occur within a narrow window could affect data quality and disrupt financial institution practices. On the other hand, the Bureau believed that safeguards would be necessary to ensure that financial institutions are not evading or delaying their obligation to collect data in a manner that detrimentally affects response rates.

Proposed comments 107(c)(1)–1 and –2 would have clarified the meaning of financial institution "procedures" and would have emphasized a financial institution's latitude to establish procedures concerning the time and manner that it collects applicant-provided data, provided that those procedures are reasonably designed to collect the applicant-provided data in proposed § 1002.107(a). Proposed comment 107(c)(1)–3 would have clarified what constitutes "applicant-provided data" in proposed § 1002.107(c)(1).

Proposed comment 107(c)(1)–4 would have provided additional guidance on financial institutions' procedures that are reasonably designed to obtain a response. Proposed comment 107(c)(1)–4 would have provided that a financial institution shall assess on a periodic basis whether its procedures are reasonably designed. Proposed comment 107(c)(1)–4 would have explained that one way a financial institution may be able to assess whether its procedures are reasonably designed would be, once 1071 data are made publicly available, to compare its response rate with similarly situated financial institutions (for example, those that offer similar products, use a similar lending model, or are of a similar size).

Proposed comments 107(c)(1)–5 and –6 would have provided examples of procedures that generally are and are not reasonably designed to obtain a response. Proposed comment 107(c)(1)–5 would have provided that, although a fact-based determination, a procedure reasonably designed to obtain a response is one in which a financial institution requests applicant-provided data at the time of a covered application; the earlier a financial institution seeks to collect applicant-provided information, the more likely the timing of collection is reasonably designed to obtain an applicant response. Conversely, proposed comment 107(c)(1)–6 would have provided that, as a general matter, a procedure is not reasonably designed to obtain a response if a financial institution requests applicant-provided data simultaneous with or after notifying an applicant of action taken on the covered application. Proposed comment 107(c)(1)–6 would have provided that depending on the particular facts, however, these procedures may be reasonably designed to obtain a response; for example, if the financial institution has evidence or a reason to believe that under its procedures the response rate would be similar to or better than other alternatives.

Proposed comment 107(c)(1)–7 would have explained that a financial institution reports updated applicant-provided data if it obtains more current

[768] *See, e.g.,* ECOA section 704B(b) ("[I]n the case of any *application* to a financial institution . . . .") and 704B(c) ("Any *applicant* . . . may refuse to provide any information requested . . . .") (emphases added)).

data during the application process. Proposed comment 107(c)(1)–8 would have provided guidance in the event a financial institution changes its determination regarding an applicant's status as a small business.

The Bureau sought comment on proposed § 1002.107(c)(1) and associated commentary.

Comments Received

The Bureau received comment on proposed § 1002.107(c)(1) from a number of lenders, trade associations, and community groups. Commenters expressed a range of views.

General comments related to proposed § 1002.107(c)(1). A number of commenters, mainly from industry, supported the flexibility provided in proposed § 1002.107(c)(1), including provisions that would have allowed financial institutions leeway to establish data collection procedures that best fit within their processes and business models. A CDFI lender emphasized that lenders have varying intake processes. Similarly, a trade association noted that while it anticipates most CDFIs will collect 1071 data as early in the application process as possible, including at the time an application is triggered, lenders should have flexibility to respond to market concerns. Trade associations representing automobile dealers urged the need for flexibility, for example, to accommodate the different methods by which data is collected (online and in-person) and the different parties involved in a credit transaction. A CDFI lender argued that the application and timeline often depends on the applicant themselves, further supporting the need for flexibility. A number of commenters argued for flexible collection, pointing out that small business lending, unlike mortgage lending, does not involve highly regimented application procedures. Trade associations representing automobile dealers further argued that flexibility would facilitate compliance without diminishing the information reported.

Commenters representing community banks similarly stressed the need for flexibility. A trade association asked the Bureau to provide community banks with flexibility in how and when to collect 1071 data during the lending process and latitude to determine what are reasonable collection practices. The commenter emphasized the iterative nature of small business lending, noting that the application process can span weeks or months to complete. The commenter urged the Bureau to avoid designating a prescriptive point in time when sufficient data has been gathered to trigger reporting. They further stated that community banks are good at satisfying regulatory requirements, do not need to be second-guessed in how or when they accomplish data collection, and that the Bureau should not be concerned about community banks' ability to maintain data quality and completeness. Even with the proposed flexibility, a community bank generally opposed proposed § 1002.107(c)(1), stating that the requirements are similar to HMDA, which are very onerous and unduly burdensome on small and mid-size institutions.

Comments related to the reasonably designed standard. As described above, proposed comments 107(c)(1)–4 through –6 would have provided additional guidance and examples of reasonably designed procedures. The Bureau received numerous comments concerning proposed comments 107(c)(1)–4 through –6 from a range of stakeholders.

The Bureau received a number of comments on its general approach in proposed comments 107(c)(1)–4 through –6 to provide examples of procedures that are and are not reasonably designed to obtain a response. A CDFI lender and a trade association representing CDFIs supported the proposed commentary and the description of "reasonably designed" procedures for collecting applicant-provided data. The trade association noted that the examples were helpful to identify what lenders should avoid and agreed that it is important to have safeguards to ensure the data are collected in a manner reasonably designed to obtain a response.

In contrast, other commenters argued that proposed § 1002.107(c)(1) and associated commentary are ambiguous or incomplete and urged the Bureau to provide further guidance. A trade association representing online small business lenders expressed concern that financial institutions would have increased compliance costs to avoid unintentional non-compliance. For example, financial institutions may believe they are required to compare response rates at different parts of the loan application cycle, compare results similar to an A/B testing scheme, or otherwise consistently seek to ascertain the best ways to obtain 1071 applicant-provided data. The commenter suggested the Bureau provide additional guidance so that financial institutions can ensure they meet the reasonableness standard. Another commenter similarly requested that the Bureau provide more guidance on the reasonableness standard, and in particular clarify that financial institutions have flexibility to design self-assessment methods best suited to their products, processes, and business models.

Among the proposed examples of reasonably designed procedures, the Bureau received the most comments related to the timing of collection. The comments spanned a range of positions, with some commenters advocating for a more restricted time period for collection of applicant-provided data while other commenters sought a more flexible approach. For example, some community groups argued that financial institutions should be required to collect applicant-provided data at the time of a covered application. One of these commenters said that requiring collection at the time of application would increase the likelihood of successfully receiving the requested information, and that the benefits of early collection outweigh the costs. Another commenter similarly asserted that collection at the time of a covered application would maximize responses and urged the Bureau to make it a requirement, rather than merely a suggestion, as set forth in the proposal. A credit union also said that if a customer does not provide 1071 data with an application, it will be challenging for a financial institution to accurately collect and report the required data.

In contrast, a number of industry commenters took issue with proposed comment 107(c)(1)–6, which would have provided that collection of applicant-provided data simultaneous with or after notifying an applicant of action taken is generally not reasonably designed to obtain a response. Many of these commenters argued that financial institutions should have flexibility to collect applicant-provided data after decisioning an application. A few commenters went further, arguing that collection should be permitted or required to occur after finalizing credit documents, after a credit decision is made, or during closing. One commenter stated that although the proposed rule asserts to provide flexibility for financial institutions, proposed comments 107(c)(1)–5.i and –6.i (identifying procedures concerning the timing of collection of applicant-provided data that generally would and would not be reasonably designed to obtain a response) claw back that flexibility by expressing a clear preference that would discourage financial institutions from collecting 1071 data at any time except early in the application process. The commenter suggested the Bureau instead clarify that a financial institution has flexibility to sequence collection at a time it determines is reasonable for its business and products, subject to the self-assessment process articulated in proposed 107(c)(1)–4.

Commenters advanced several arguments for why financial institutions should be permitted to collect applicant-provided data after a credit decision is made on a covered application. First, a couple of commenters stated that it would minimize friction during the application process; they asserted that mandating 1071 data collection while the application is pending would frustrate the application process, create additional obstacles, and increase the likelihood of abandoned applications. Several technology providers and a trade association representing technology providers said that the application process is already lengthy enough given existing legal and underwriting requirements. The commenters further stated that the streamlined and user-friendly application experience that technology companies have sought to establish would be further frustrated if 1071 data is required to be collected early in the application process. Some of the commenters argued that sequencing of 1071 data collection involves a tradeoff between getting small businesses to respond to 1071 data requests and getting small businesses to apply for credit at all. Another trade association similarly emphasized the need for flexibility, particularly for fast-paced processes that render a decision in minutes.

Several of the commenters argued that collection of applicant-provided data early in the process could cause an applicant to believe that such information would be considered as part of the credit decision, therefore potentially discouraging an applicant from applying for credit. A group of technology providers stated that collection of demographic information before a credit decision is made may invite the perception of bias in the application process, especially if an applicant is later denied credit. The commenters cited a Federal Reserve Banks survey, which they stated showed that minority-owned businesses were more likely than white-owned businesses to report that they did not apply for financing because they either believed they would be turned down or found the application process too difficult or confusing.[769] The commenters argued that requiring collection of applicant-provided data before a credit decision is made would exacerbate identified concerns of discouragement and undermine the purposes of section 1071. Similarly, a couple commenters expressed concerns about discouragement if demographic information is collected early in the application process. Two CDFI lenders stated that they had received feedback from applicants that providing demographic data early in the application process felt intrusive and raised concerns for the applicant that their responses would negatively affect their application. As a result, one said that it had moved collection of demographic information from the loan application stage to the loan closing stage.

A couple of commenters challenged the Bureau's assertion that applicants will be less likely to respond to requests for the action taken. One commenter noted that the proposed rule improperly places the burden on the financial institution that wants to collect 1071 data after action is taken on an application to show that response rates would be similar to or better than alternative collection methods. Another asserted that Paycheck Protection Program data demonstrate that applicants are less likely to answer a question about their race on a credit application. A trade association representing equipment and leasing finance companies similarly asserted that post-decision collection would improve response rates.

Commenters advanced several other arguments for why applicant-provided collection should be permitted or required to occur after decisioning an application. A trade association representing equipment and leasing finance companies predicted that collecting applicant-provided data with the credit application would lead applicants to provide little information given the speed of the transaction, which is often completed in minutes. The commenter also asserted that the person initially completing the application is often not the business owner or familiar with the owner, and so would lack the requisite knowledge to provide certain 1071-required information. If, on the other hand, the financial institution can follow-up electronically or through other means with the business, the commenter asserted that the request could be directed to the person in the best position to provide the information. The commenter further stated that collecting 1071 data during the application stage would be particularly problematic for vendor finance transactions because the vendor collecting application information has no regulatory requirement to do so, and so would unlikely take the time to gather the required information. Another commenter asserted that post-decision collection would also ensure that underwriters would not have access to an applicant's responses related to ethnicity, race, and sex. The commenter asserted that financial institutions could ensure data is collected by making it part of the closing procedures for approved loans and as part of remediation efforts for non-approved loans.

In addition to seeking comment related to the timing of collection, the Bureau sought comment on proposed § 1002.107(c)(1) and associated proposed commentary generally, including on the other examples in proposed comments 107(c)(1)–5 and –6 of procedures that generally would and would not be reasonably designed to obtain a response. The Bureau further asked commenters whether it would be useful to provide additional examples. In response, commenters raised a number of issues related to the commentary on reasonably designed procedures in proposed comments 107(c)(1)–4 through –6.

Several commenters weighed in on the provision in proposed comment 107(c)(1)–4 that financial institutions shall "reassess on a periodic basis" whether its procedures are reasonably designed to obtain a response. One commenter stated that it would be appropriate for financial institutions to conduct periodic reassessments of their collection procedures, but urged that procedures should not need to be reexamined more frequently than once every three years. The commenter suggested an additional safeguard would be to encourage consistent collection across individual institutions and small business lending sectors. Another commenter urged the Bureau to provide greater clarity on how frequent "periodic" testing must occur so that financial institutions can allocate resources accordingly, and encouraged the Bureau to take into account different products and resources among financial institutions. A business advocacy group urged the Bureau not to treat an applicant's decision to not to provide 1071 data as evidence that a lender lacks reasonably designed procedures.

A couple of commenters provided feedback on the use of response rates. A community group and a minority

[769] Citing Fed. Rsrv. Bank of Atlanta *et al., Small Business Credit Survey: 2021 Report on Firms Owned by People of Color,* at 25 (Apr. 15, 2021), *https://www.fedsmallbusiness.org/survey/2021/2021-report-on-firms-owned-by-people-of-color.*

business advocacy group asked the Bureau to reconsider guidance in proposed comment 107(c)(1)–4 that a financial institution may assess the reasonableness of its procedures by, for example, comparing its response rate with similarly situated financial institutions. The commenters argued that peers may also not be making a reasonable effort to collect the data, and that it would be better to have a concrete metric, for example, based on other data collection efforts with good response rates.

A handful of commenters asked the Bureau to take other actions related to proposed § 1002.107(c)(1), including to provide additional clarifications and guidance. First, a trade association asked the Bureau to clarify that lenders need only request 1071-required data once. Next, a group of trade associations asked for clarification on proposed comment 107(c)(1)–7, which would have provided that a financial institution reports updated applicant-provided data if it obtains more current data during the application process. The commenter said that the requirement to ''update'' information is ambiguous, and inquired whether a financial institution would be required to update information if an applicant supplies updated data without a request from the financial institution. The commenter also asserted that it was unclear how proposed comment 107(c)(1)–7 relates to proposed § 1002.107(b) related to the reporting of verified information where obtained. A network of financial institutions specializing in agricultural lending stated that certain lenders use the information included in scoring models to determine whether the applicant business is a ''small business,'' and so would not be able to identify applications involving a small business for which demographic information must be collected, until after a credit decision is made. The commenter argued that because ECOA and the Fair Credit Reporting Act require a timely decision be made and communicated, it would be a direct conflict of the regulations to delay communicating a credit decision to a customer solely to acquire data for demographic reporting purposes.

Several commenters asked the Bureau to provide additional guidance on the manner in which applicant-provided data can be collected, including disclosures and sample forms for collection. A CDFI lender asked the Bureau to share best practices on disclosures or assurances a lender can provide applicants when collecting demographic information to allay concerns about how the data will be used. A community bank and a community group urged the Bureau to provide a data collection form for financial institutions to use when collecting 1071 data from applicants. The community bank asserted that use of a data collection form would increase borrower response rates, as demonstrated by Paycheck Protection Program statistics. The commenter also argued that absent a uniform CFPB-issued form, collection will be flawed and the data useless. A community group stated that the Bureau may want to create a sample application form with all required data elements in order to facilitate data collection. Finally, a bank and a trade association urged the Bureau to expressly permit covered financial institutions to collect required data from applicants through a variety of means, including on an application form, on supplemental documents or forms, or on the proposed sample data collection form. The commenters stated that certain applicant-provided data points, such as number of workers, time in business, and NAICS code, are not on the sample data collection form. The commenters stated that except for data points required to be collected on the sample data collection form and kept separate, financial institutions should be permitted to collect the other data points through various means or forms.

Comments requesting special treatment for particular transactions or financial institutions. Several commenters urged the Bureau exempt particular types of transactions or lenders from coverage under the rule, primarily due to concerns about the specific characteristics of these application processes and the particular difficulty of collecting demographic information in light of these characteristics.[770] As discussed in the NPRM, the proposed rule would not have made any exceptions concerning the time and manner of collecting 1071 data for point of sale transactions.[771] In response to the Bureau's request for comment on point of sale transactions, two trade association commenters and a community group stated that such transactions should be provided special treatment or exceptions. The two trade associations, one representing industry and another representing retailers, opposed rule coverage for private label applications, focusing particularly on point of sale transactions. One stated that credit applications are taken at the point of sale or at a customer service desk using interview-style or interactive processes. The commenters asserted that customers would feel uncomfortable answering questions related to their race, sex, and ethnicity in such a public place, without the necessary privacy accommodations. They also argued that collecting applicant-provided data would significantly lengthen the application process, frustrating retailers' focus on speed, efficiency, and limiting time spent in the checkout line. The commenters further asserted that requiring 1071 data collection at the point of sale would impede the availability of commercial credit applications in-store, both because businesses would not want to apply for credit and because retailers would no longer offer in-store private label credit. One also argued that point of sale transaction data would be of reduced data quality: the data may be collected from persons who are not the principal owners of a business and may therefor lack the relevant knowledge, the environment is not conducive to collecting detailed information, and the data would reflect the retailer's, rather than a financial institution's, clientele. The commenter also said that retail staff are unable to manage sensitive demographic information and that retailers will not appreciate allegations of discrimination if an application is left pending or denied. A few commenters suggested that if the Bureau were to include private label or co-branded transactions (which often occur as point of sale transactions) in the final rule, it should exempt transactions under $50,000 to mitigate the impact of inclusion and provide consistency with FinCEN's customer due diligence rule. Similarly, a trade association stated that if point of sale transactions are included, credit lines below $50,000 should be excepted from the requirement to obtain demographic information.

In contrast, a community group urged the Bureau not to provide special treatment for point of sale transactions, arguing that point of sale transactions should follow a similar procedure as other covered transactions. The commenter voiced agreement for the Bureau's suggestion in the proposed rule that retail stores can use the sample data collection form (printed or online) for point of sale transactions.

Next, a trade association representing insurance premium finance lenders and insurance agents and brokers similarly argued that the Bureau's rule should not apply to insurance premium finance

[770] See also the section-by-section analysis of § 1002.104 (covered credit transactions) concerning additional comments related to private-label credit and insurance premium finance transactions, and the section-by-section analysis of § 1002.105 (covered financial institutions and exempt institutions) concerning indirect lending.

[771] 86 FR 56356, 56487–88 (Oct. 8, 2021).

lenders, asserting that such lenders cannot collect 1071 data until after funding. Comments regarding insurance premium finance are discussed in the section-by-section analysis of § 1002.104(b)(3).

Finally, one trade association argued for the exemption of captive vehicle finance lenders, based in part on concerns about the collection of small business lending data. The commenter argued that because indirect lenders do not interact with the applicant, they cannot gather certain data required by section 1071, and therefore the motor vehicle dealer would be the only party capable of requesting the applicant's protected demographic information. However, the commenter asserted, the dealer is outside the CFPB's authority and is currently prohibited by ECOA from gathering this information. The commenter stated that the proposal would put pressure on dealers to collect otherwise protected information. The commenter further noted that the employee acquiring the vehicle may not be familiar with the requested data, such as total revenue or ownership structure. In addition, the commenter voiced concerns about purportedly having to collect data at each stage of the process, potentially by multiple covered financial institutions. The commenter argued that requiring collection of 1071 data (such as ethnicity, race, and sex information) at multiple points in the process would be unnecessary, costly, and duplicative, and could expose financial institutions to liability.

Final Rule—Overview of Final § 1002.107(c)

For the reasons set forth below, the Bureau is finalizing § 1002.107(c)(1) to require a covered financial institution to not discourage an applicant from responding to requests for applicant-provided data under final § 1002.107(a) and to otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response. The Bureau is adopting new § 1002.107(c)(2) to identify certain minimum components when collecting data directly from the applicant that must be included within a financial institution's procedures to ensure they are reasonably designed to obtain a response. The Bureau is also adopting new § 1002.107(c)(3) to provide the additional safeguard that a covered financial institution must maintain procedures to identify and respond to indicia that it may be discouraging applicants from responding to requests for applicant-provided data, including low response rates for applicant-provided data. Finally, new § 1002.107(c)(4) provides that low response rates for applicant-provided data may indicate that a financial institution is discouraging applicants from responding to requests for applicant-provided data or otherwise failing to maintain procedures to collect applicant-provided data that are reasonably designed to obtain a response. The Bureau is finalizing § 1002.107(c) pursuant to its authority in ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. For the reasons discussed below, final § 1002.107(c) is necessary to collect 1071 data from applicants and prevent financial institutions from discouraging or influencing an applicant's response.

Final § 1002.107(c) seeks to provide a balance between flexibility and ensuring data collection occurs without discouragement and otherwise in a time and manner likely to generate a robust response. On the one hand, the Bureau believes there are benefits to preserving some flexibility concerning the time and manner in which applicant-provided data are collected. As noted by a number of commenters, there are benefits to providing a flexible approach given the variety of application processes in the small business lending space. The Bureau believes that financial institutions may need latitude to adjust data collection practices to fit within their own processes and business models; requiring data collection at a single point in time, or only through a particular method, may affect data quality and disrupt financial institutions' practices.

On the other hand, the Bureau believes that collection of applicant-provided data is essential to fulfilling the purposes of section 1071. The Bureau therefore believes that substantial safeguards are necessary to ensure that financial institutions do not discourage applicants from responding to requests for applicant-provided data or otherwise evade or delay their obligation to collect 1071 data in a manner that detrimentally affects response rates.

The Bureau is also implementing revisions to final § 1002.107(c) to provide additional clarity to covered financial institutions concerning the reasonably designed standard and minimum requirements. These changes are responsive to feedback from commenters that proposed 1002.107(c)(1) and associated commentary would have been ambiguous and potentially inconsistent, and requesting further clarity and guidance. The revisions to final § 1002.107(c) and responses to commenter feedback are discussed in depth below.

Final Rule—§ 1002.107(c)(1) in General

Final § 1002.107(c)(1) requires a covered financial institution to not discourage applicants from responding to requests for applicant-provided data under § 1002.107(a) and to otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response. As discussed above, the Bureau believes this general standard provides flexibility to accommodate various small business lending models while also imposing a general duty to maintain procedures concerning the collection of applicant-provided data that are reasonably designed to obtain a response, including not discouraging applicant responses. In general, reasonably designed procedures will seek to maximize collection of applicant-provided data and minimize missing or erroneous data, and procedures cannot be reasonably designed if they permit financial institutions to engage in conduct that discourages applicants from responding to requests for applicant-provided data. While the Bureau believes that reasonably designed procedures to collect applicant-provided data inherently must not discourage applicants from responding, in response to comments seeking additional clarity on the Bureau's understanding of reasonably designed procedures, the Bureau is now clearly articulating the prohibition against discouragement.

Comments 107(c)(1)–1 and –3 are finalized with minor revisions for clarity and consistency. Final comment 107(c)(1)–2 is revised to affirm a financial institution's flexibility to establish procedures concerning the time and manner that it collects applicant-provided data, provided that its procedures otherwise meet the requirements of final § 1002.107(c).

New comment 107(c)(1)–4 (part of which was proposed as part of comment 107(c)(1)–3) clarifies that applicant-provided data can be obtained without a direct request to the applicant and can be based on other information provided by the applicant or through appropriate third-party sources.

The Bureau is revising comment 107(c)(1)–5 (proposed as comment 107(c)(1)–7) to clarify that a financial institution reports updated data if it obtains more current data from the applicant during the application process. In response to a commenter's request for additional guidance on whether a financial institution must update data if the applicant provides the information without a request from the financial institution, the Bureau notes that final comment 107(c)(1)–5 requires a financial institution to report data updated by the applicant regardless of whether the financial institution solicits the information. The commenter also asked how proposed comment 107(c)(1)–7 differs from proposed § 1002.107(b), which would have permitted a financial institution to rely on statements of the applicant when compiling data, unless verified information was available. Both final comment 107(c)(1)–5 and final § 1002.107(b) require reporting of updated information where available; the former is focused on data provided by the applicant, while the latter is focused on data verified by the financial institution. Thus, no matter the source, a financial institution should report updated data where available. To the extent a financial institution receives updates from the applicant on data the financial institution has already verified, final comment 107(c)(1)–5 is revised to clarify that a financial institution reports the information it believes to be more accurate, in its discretion.

Final Rule—§ 1002.107(c)(2) Applicant-Provided Data Collected Directly From the Applicant

The Bureau is adopting new § 1002.107(c)(2), which provides that for data collected directly from the applicant, procedures that are reasonably designed to obtain a response must include four specific components, which are further described below. The Bureau is adopting new § 1002.107(c)(2) to provide financial institutions additional clarity on minimum criteria the Bureau believes are necessary for a financial institution's procedures to be "reasonably designed" to obtain a response. Although proposed comments 107(c)(1)–4 through –6 would have provided examples of procedures that generally were and were not reasonably designed, as discussed above, the Bureau received feedback that proposed § 1002.107(c)(1) and associated comments would have been ambiguous, been incomplete, or increased compliance burdens on financial institutions seeking to avoid unintentional non-compliance. The Bureau also believes that greater clarity will increase compliance and help ensure financial institutions put such safeguards into place.

New comment 107(c)(2)–1 provides general guidance on what are reasonably designed procedures and the minimum criteria required under final § 1002.107(c)(2). Comment 107(c)(2)–1 clarifies that whether a financial institution's procedures are reasonably designed is a fact-based determination that may depend on a number of factors, and that procedures that are reasonably designed to obtain a response may therefore require additional provisions beyond the minimum criteria set forth in § 1002.107(c)(2). In general, reasonably designed procedures will seek to maximize collection of applicant-provided data and minimize missing or erroneous data.

The specific components that must be included within a financial institution's procedures pursuant to final § 1002.107(c)(2) are each discussed in turn below.

Provisions primarily related to the timing of collection. The Bureau is adopting new § 1002.107(c)(2)(i), which requires covered financial institutions to maintain procedures that provide for the initial request for applicant-provided data to occur prior to notifying an applicant of final action taken on a covered application. The Bureau believes this requirement strikes the right balance between providing financial institutions some flexibility to time the initial collection of applicant-provided data at a point that works for their business models, while also putting in place a guardrail to ensure that applicant-provided data is not collected so late in the process that it jeopardizes the likelihood of receiving a response from an applicant. Unlike proposed § 1002.107(c)(1), which did not set forth any concrete timing deadlines for the collection of applicant-provided data, final § 1002.107(c)(2)(i) requires financial institutions to initially seek to collect applicant-provided data, at the latest, before notifying the applicant of final action taken on a covered application. The Bureau is adopting this revision for several reasons, described below.

Foremost among them, the Bureau believes that initial attempts to collect applicant-provided data after notifying an applicant of action taken on an application—particularly if the action taken is a denial—are likely to result in higher rates of missing data. This view is unchanged from the Bureau's initial position at the NPRM stage, which similarly encouraged collection early in the process and before notifying the applicant of action taken on the application.[772] Not only will late collections miss withdrawn or incomplete applications—information about which is essential to the purposes of section 1071—but it will also likely jeopardize the probability of responses from declined applicants. Unlike originated applications, which have continuous touch points between an applicant and a lender, the Bureau believes it is highly unlikely that an applicant will continue to engage in any information gathering process after being denied a request for credit. Significantly, no commenter provided a viable solution for ensuring collection of 1071 data after an application is denied.

Next, final § 1002.107(c)(2)(i) provides a bright line point in the application process before which financial institutions must initially seek to collect applicant-provided data, therefore responding to certain commenter feedback that the proposed standard would be ambiguous. As noted by one commenter, although the proposal asserted to provide flexibility for financial institutions to collect applicant-provided data at any point during the application process, so long as the procedures are reasonably designed, the proposed commentary clawed back that flexibility by expressing a clear preference for collection before notifying an applicant of the outcome of its application. The Bureau agrees this fluid framing may cause confusion, and believes providing a defined time frame early enough in the process when applicant-provided data must be collected will assist financial institutions with compliance.

Finally, other changes in the final rule counsel in favor of adopting a more concrete timing standard for the collection of applicant-provided data. Unlike the proposal, which would have included a requirement in certain circumstances for financial institutions to collect information about an applicant's ethnicity and race based on visual observation and/or surname analysis if the applicant did not itself provide such information, as discussed in the section-by-section analysis of § 1002.107(a)(19) above, the final rule does not include such a requirement. As

[772] As discussed above, proposed comment 107(c)(1)–5 would have provided that although a fact-based determination, a procedure reasonably designed to obtain a response is one in which a financial institution requests applicant-provided data at the time of a covered application. Conversely, proposed comment 107(c)(1)–6 would have provided that a procedure is generally not reasonably designed to obtain a response if a financial institution requests applicant-provided data simultaneous with or after notifying an applicant of action taken on the covered application.

a result, financial institutions might be less motivated to obtain demographic information early enough in the process, when the applicant is still actively engaged and more likely to respond to data requests.

As described above, some commenters urged the Bureau to tighten the timing requirement to require collection in a narrow timeframe, while others asked the Bureau to expand the timing requirement to widely permit collection even after notifying an applicant of action taken on a covered application. The Bureau is not adopting either approach. Although the Bureau agrees with commenters who argued that collection at the time of a covered application will likely increase applicant responses rates in most instances, given the fluid and heterogenous nature of small business lending, the Bureau believes designating a narrow time-frame may be overly restrictive.

On the other hand, the Bureau is also not permitting financial institutions to attempt the initial collection of applicant-provided data after notifying an applicant of action taken on an application. Industry commenters' principal argument was that collection of sensitive applicant-provided data before decisioning an application could lead to discouragement: applicants may be concerned that the information will be used against them in the credit decision and thus will either not provide the information or not proceed with the credit transaction altogether. Industry commenters also raised the concern that financial institutions could be accused of bias if an applicant is ultimately denied credit after providing protected demographic information.

The Bureau does not believe that early collection will discourage applicants from disclosing certain demographic information and does not believe this concern expressed by commenters outweighs the benefits of early data collection. Initially, concerns of discouragement may be mitigated by the mandatory disclosure language set forth in final comments 107(a)(18)–3 and 107(a)(19)–3, and included on the sample data collection form in appendix E, which explains to applicants the reason the information is being collected and that the information cannot be used to discriminate against the applicant. If, however, an applicant remains concerned about providing applicant demographic information, the applicant can always choose to not provide any requested information (*e.g.,* by selecting ''I do not wish to provide this information'' or similar for any of the demographic information inquiries).

As set forth in final comments 107(a)(18)–1 and 107(a)(19)–1, a financial institution must permit an applicant to refuse or decline to answer inquiries regarding the applicant's protected demographic information and must inform the applicant that the applicant is not required to provide the information. These protections ensure that any applicant who does not feel comfortable providing a response to the demographic inquiries, is not required to do so.

Similarly, the Bureau does not believe that requiring an initial collection attempt before notifying an applicant of action taken will result in fewer applicants voluntarily providing certain demographic information. The Bureau notes that financial institutions regularly collect, at the time of application, demographic information required by Regulation C without issue. Although certain commenters cited to the Paycheck Protection Program as evidence that the collection of demographic information at the time of application results in low response rates, the demographic response rates for Regulation C are significantly higher than for the Paycheck Protection Program, with only 14.3 and 14.7 percent of HMDA respondents not providing a response for race and ethnicity, respectively.[773] Thus, the lower response rate for Paycheck Protection Program applicants is likely due to independent factors. Moreover, to the extent that a financial institution believes that applicants may be reluctant to provide demographic data before an application is decisioned, new § 1002.107(c)(2)(i) only requires a financial institution to make an *initial* collection attempt before notifying an applicant of action taken; nothing prevents a financial institution from making *another* attempt to collect data required by this rule after the application is decisioned.

Ultimately, any applicant reluctance to provide demographic (or other applicant-provided data) pre-decision is not outweighed by the commonsense conclusion that applicants will be unwilling and unmotivated to provide information after being denied a request for credit. After a denial, an applicant will have no independent reason to continue discussions with the lender, much less respond to new requests for information. In this respect, 1071 data collection is distinct from current collection efforts by CDFIs that generally seek to collect demographic information for originated loans, but not denied loans. While CDFI commenters' practice of collecting demographic data at loan closing may make sense for other regulatory regimes, it would not be effective at capturing data on denied, incomplete, or withdrawn applications.[774] Although some commenters asserted that response rates would be better if demographic information is collected post-decision, significantly, none of the commenters were able to provide persuasive evidence in support of their assertion, to rebut the belief that applicants are unlikely to respond to information requests once they are no longer involved in the application process, or to offer a workable solution to ensure robust data collection post-decision. While one commenter suggested that financial institutions could collect applicant-provided data ''as part of remediation efforts for non-approved loans,'' the commenter provided no specifics as to what this would entail, or how or why it would be effective.

Next, commenters stated that permitting post-decision collection would minimize friction in the application process. These commenters argued that streamlining the application process is of paramount importance to their business, and any additional delay could frustrate the application process and lead to abandoned applications. The Bureau agrees that new § 1002.107(c)(2)(i) may require financial institutions to take some minimal additional steps during the information gathering stage of the application process, but believes that these additional minimal steps are necessary to fulfill the purposes of section 1071 and should not impact meaningfully the rate of abandoned applications. Moreover, as discussed in the section-by-section analysis of § 1002.107(d), the Bureau has provided flexibilities for financial institutions to reuse some applicant-provided data under certain circumstances, which may alleviate the

[773] *See* 86 FR 56356, 56483 (Oct. 8, 2021) (noting that demographic response rates in the SBA's Paycheck Protection Program data are ''much lower when compared to ethnicity, race, and sex response rates in HMDA data. For instance, roughly 71 percent of respondents in the [Paycheck Protection Program] data did not provide a response for race, compared to only 14.7 percent in the HMDA data. Roughly 66 percent of respondents in the [Paycheck Protection Program] data did not provide a response for ethnicity, compared to only 14.3 percent in the HMDA data.'') (citing Small Bus. Admin., *Paycheck Protection Program Weekly Reports 2021, Version 11,* at 9 (effective Apr. 5, 2021), *https://www.sba.gov/sites/default/files/2021-04/PPP_Report_Public_210404-508.pdf*.

[774] *See, e.g.,* 12 CFR 1805.803 (identifying data collection and reporting requirements for the CDFI program, which provides that a financial institution recipient shall ''compile data on gender, race, ethnicity, national original, or other information on *individuals that utilize its products and services* . . . .'') (emphasis added).

need for repeated collections. In response to an industry commenter's argument that applicants are unlikely to respond to 1071 data requests given the speed of certain application processes, the Bureau notes that the applicant is less likely to respond if the data is requested post-decision when the applicant is no longer engaged in the process at all. Given the relatively limited time it would take to collect 1071 data, the Bureau also rejects commenters' assertion that requesting 1071 data will negatively impact whether a small business applies for credit at all. No commenter provided persuasive evidence that applicants will avoid seeking credit because of data collection under this rule.

Commenters raised a handful of additional arguments. In response to a commenter's argument that the person initially completing the application may not be the business owner or have the requisite knowledge, the Bureau notes that new comment 107(c)(2)–2.v permits a financial institution to follow-up with additional attempts to collect the information through different means or at another time. Moreover, given that approximately 82 percent of small businesses are non-employer firms,[775] the Bureau believes in most instances the individual completing the form will have the relevant information.

Next, in response to a comment that post-decision collection would ensure underwriters do not have access to protected demographic information, the Bureau agrees, but does not believe that such considerations trump the importance of ensuring data are collected in the first place. Indeed, the fact that ECOA section 704B(d)(2) contemplates that underwriters and other employees involved in making a credit determination may have access to applicant-provided data demonstrates that Congress envisioned that financial institutions may collect 1071 data before decisioning an application. In any event, concerns about access to demographic information are adequately addressed by the firewall provision in final § 1002.108, as well as the general prohibition from discriminating on a prohibited basis in any aspect of a credit transaction in existing ECOA and Regulation B.

Finally, one commenter indirectly took issue with the requirement to collect applicant-provided data in advance of notifying an applicant of action taken by noting that certain lenders would use decision scoring models to also determine whether the applicant is a "small business," such that demographic information could only be collected after a decision is made on the application. Initially, the Bureau notes that nothing prevents a financial institution from inquiring whether the applicant is a "small business," and if so, seeking applicant-provided data before decisioning the covered application. Indeed, as discussed in final comment 107(c)(2)–2.i, the earlier in the application process the financial institution initially seeks to collect applicant-provided data, the more likely the timing of collection is reasonably designed to obtain a response. The Bureau also does not agree that delaying communicating a credit decision to an applicant in order to acquire demographic or other applicant-provided data would violate ECOA and the Fair Credit Reporting Act. The Bureau does not believe there is a conflict between the laws; any delay would be minimal, would not affect the timeframes under existing Regulation B to provide required notices when decisioning a credit application,[776] and could be avoided by collecting applicant-provided data in advance, as discussed above.[777]

For the reasons discussed above, including that collection occurring post-final action would undermine the purposes of section 1071, the Bureau is requiring financial institutions to maintain procedures to collect applicant-provided data before notifying the applicant of final action on the application.[778] The Bureau is also adopting new comment 107(c)(2)–2.i, which provides additional guidance concerning when financial institutions must initially seek to collect 1071 applicant-provided data. New comment 107(c)(2)–2.i clarifies that § 1002.107(c)(2) requires that under no circumstances may the initial request for applicant-provided data occur simultaneous with or after notifying an applicant of final action taken on a covered application.[779]

Although new § 1002.107(c)(2)(i) requires a financial institution to make an initial collection attempt prior to notifying an applicant of action taken, new comment 107(c)(2)–2.v clarifies that a financial institution has latitude to make additional requests for applicant-provided data, including after notifying the applicant of action taken. In response to a trade association's request that the Bureau clarify how many times a financial institution must request 1071 data, new comment 107(c)(2)–2.v clarifies that a financial institution is permitted, but not required, to make more than one attempt to obtain applicant-provided data if the applicant does not respond to an initial request. For example, a financial institution may decide to make multiple requests if it is concerned that applicants may not be as forthcoming early in the process, if it has multiple opportunities to request 1071 data that work well within its business processes, or as another method to encourage greater applicant response.

Provisions primarily related to the manner of collection. New § 1002.107(c)(2)(ii) through (iv) sets forth provisions that financial institutions must incorporate into their procedures for collecting applicant-provided data directly from the applicant to ensure that such procedures are reasonably designed to obtain a response and do not discourage a response. New § 1002.107(c)(2)(ii) requires financial institutions to maintain procedures that provide the request for applicant-provided data is prominently displayed or presented. New comment 107(c)(2)–2.ii provides further guidance on the requirement, clarifying that a financial institution must ensure an applicant actually sees, hears, or is otherwise presented with the request for applicant-provided data, and that if the request is obscured or likely to be overlooked or missed by the applicant, it is not reasonably designed. For example, a financial institution

[775] White Paper at 8; *see also* U.S. Small Bus. Admin., Off. of Advocacy, *2022 Small Business Profile,* at 2 (2022), *https://cdn.advocacy.sba.gov/wp-content/uploads/2022/08/30121338/Small-Business-Economic-Profile-US.pdf* (identifying 33,185,550 small businesses, of which 27,104,006 have no employees).

[776] Existing Regulation B § 1002.19(a)(1) requires a creditor to notify an applicant of action taken within 30 days after receiving a completed application.

[777] *See Epic Sys. Corp.* v. *Lewis,* 138 S. Ct. 1612, 1624 (2018) ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.' " (citation omitted)).

[778] Although final § 1002.107(c)(2)(i) requires collection before *notifying* an applicant of final action on an application, the Bureau anticipates that in the vast majority of cases financial institutions will also collect applicant-provided data before *decisioning* an application. The Bureau is requiring collection based on when an applicant is notified of final action on the application, however, given the concerns noted above (particularly related to the applicant's willingness to stay engaged) and because a financial institution may have an easier time controlling when an applicant is notified, versus when an application is decisioned.

[779] Nor may a financial institution seek to evade § 1002.107(c)(2)(i) by initially seeking to collect applicant-provided data after it has signaled to the applicant that its application has been decisioned and the likely outcome, even if the financial institution has not yet formally notified the applicant of action taken on the covered application. Such conduct would not constitute procedures reasonably designed to obtain a response, as required pursuant to § 1002.107(c)(1).

seeking to collect 1071 data in connection with a digital application likely does not have reasonably designed procedures if it uses a bypassable hyperlink for 1071 data collection while other data are requested through click-through screens.

New § 1002.107(c)(2)(iii) requires that the financial institution's procedures must not have the effect of discouraging applicants from responding to a request for applicant-provided data. New comment 107(c)(2)–2.iii clarifies that a covered financial institution that collects applicant-provided data in a time or manner that directly or indirectly discourages or obstructs an applicant from responding or providing a particular response violates the rule. The comment also provides further guidance on procedures that may avoid the effect of discouraging a response. For example, comment 107(c)(2)–2.iii.B explains a covered financial institution avoids discouraging a response by requiring an applicant to provide a response in order to proceed with a covered application, including, as applicable, a response of ''I do not wish to provide this information'' or similar. While optional, requiring an applicant to provide a response, particularly for the collection of demographic applicant information, may be one of the most effective methods a financial institution can use to maximize collection of such data.

The Bureau notes that other aspects of this final rule are similarly directed at ensuring applicants are not discouraged from providing a response. For example, in response to a commenter's request that the Bureau provide potential disclosure language and sample collection forms financial institutions can use with applicants to allay concerns about how data will be used, the Bureau notes that the final rule provides for such required disclosure language and a sample disclosure form. For instance, final comments 107(a)(18)–4 and 107(a)(19)–4, concerning collection of applicant demographic information, require financial institutions to inform the applicant both that a financial institution cannot discriminate on the basis of the applicant's responses to data collected pursuant to § 1002.107(a)(18) and (19) and that Federal law requires them to ask for an applicant's demographic information to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. The Bureau believes such explanations, which are included in the sample data collection form in appendix E, are important to inform applicants why the request is being made and to assure them that financial institutions may not use the information collected for a discriminatory purpose.[780]

Finally, new § 1002.107(c)(2)(iv) requires that the financial institution's procedures include provisions that ensure applicants can easily respond to a request for applicant-provided data. New comment 107(c)(2)–2.iv provides additional guidance and examples of procedures that would and would not make it easy for an applicant to provide a response. The comment further clarifies that a financial institution complies with § 1002.107(c)(2)(iv) if it requests the applicant to respond to inquiries made pursuant to § 1002.107(a)(18) and (19) through a reasonable method intended to keep the applicant's responses discrete and protected from view. For example, if an applicant is completing a paper application form, a financial institution may request that the applicant return a paper data collection form requesting demographic data in a sealed envelope provided by the financial institution.

In response to a commenter's suggestion that the Bureau permit financial institutions to collect applicant-provided data through a variety of means, the Bureau notes that nothing requires a financial institution to request applicant-provided data in a single format or manner, and indeed new comment 107(c)(2)–2.iv expressly contemplates that a financial institution may use multiple methods to collect applicant-provided data.

Final Rule—§ 1002.107(c)(3) Procedures To Monitor Compliance

The Bureau is adopting new § 1002.107(c)(3) to require that a covered financial institution maintain procedures designed to identify and respond to indicia of potential discouragement, including low response rates for applicant-provided data. The Bureau is adopting new § 1002.107(c)(3) in order to provide greater clarity and safeguards on the type of infrastructure financial institutions are expected to have in place in order to ensure compliance with final § 1002.107(c)(1) and (2). Although the Bureau anticipates that the particular components of a financial institution's procedures will vary from institution to institution, to provide regulatory clarity, new comment 107(c)(3)–1 provides a list of procedures the Bureau generally expects financial institutions will maintain in order to identify and respond to indicia of potential discouragement.[781]

In response to commenters' request for additional guidance on proposed comment 107(c)(1)–4, which would have required financial institutions to reassess on a periodic basis, based on available data, whether its procedures are reasonably designed to obtain a response, the Bureau notes that new § 1002.107(c)(3) and comment 107(c)(3)–1 clarify the type of monitoring expected of financial institutions. In response to a commenter's question about whether a financial institution is permitted or required to engage in testing beyond peer analysis, such as A/B testing or other methods, the Bureau notes that nothing in the final rule requires a financial institution to do so. While a financial institution is certainly free to experiment with different procedures to see which are most effective for its business model, a financial institution may typically comply with final § 1002.107(c) by following the minimum factors and guidelines set forth in final § 1002.107(c)(1) through (3) and associated commentary. In response to a commenter's request for further guidance on what constitutes ''periodic'' peer testing, the Bureau notes initially that the term ''periodic'' does not appear in new § 1002.107(c)(3) or its associated commentary. The Bureau does anticipate, however, regular monitoring under new § 1002.107(c)(3) in order to identify and respond to indicia of potential discouragement. There is no designated number or time frame for how often that monitoring must occur; rather, the precise cadence and scope will vary depending on the financial institution's procedures for collecting applicant-provided data, its business model, and other relevant factors.

Final Rule—§ 1002.107(c)(4) Low Response Rates

The Bureau is adopting new § 1002.107(c)(4) to provide that a low

[780] In response to a community group's suggestion that the Bureau create a sample form with all required data elements, the Bureau notes that, except for collection of certain demographic information, many financial institutions already collect some or all of the data required by this final rule, or may opt do so in a myriad of ways. See the section-by-section analysis of appendix E for further discussion of why the Bureau is not adopting sample or model forms for the collection of other types of data required by this rule.

[781] The Bureau acknowledges that financial institutions may not have all the necessary data to conduct a robust peer analysis of response rates until after 1071 data collection has been in effect for some period of time, and that the availability and robustness of a peer analysis will also depend on the extent to which 1071 data are made publicly available. In the meantime, the Bureau still expects financial institutions to monitor response rates internally and in comparison to public data, as available.

response rate for applicant-provided data may indicate discouragement or other failure by a covered financial institution to maintain procedures to collect applicant-provided data that are reasonably designed to obtain a response. Similar to proposed comment 107(c)(1)–4, which would have provided that a financial institution may compare its response rate to peer institutions as a method to assess whether its procedures are reasonably designed, final § 1002.107(c)(4) identifies the importance of response rates as a method to assess whether a financial institution has reasonably designed procedures. The Bureau anticipates that in many instances, a low response rate may indicate a failure to comply with final § 1002.107(c)(1) and (2). The Bureau is adopting § 1002.107(c)(4) in order to provide covered financial institutions clarity on the type of information that may be used to assess a financial institution's procedures.

The Bureau is adopting new comment 107(c)(4)–1 to provide further guidance on how to assess response rates. The comment clarifies that "response rate" generally refers to whether the financial institution has obtained some type of response to requests for applicant-provided data (including, as applicable, a response from the applicant of "I do not wish to provide this information" or similar). However, significant irregularities in a particular response (for example, very high rates of "I do not wish to provide this information" or similar) may also indicate that a financial institution does not have reasonably designed procedures. In particular, significant irregularities may indicate the financial institution is somehow steering, improperly interfering with, or otherwise discouraging or obstructing an applicants' preferred response. New comment 107(c)(4)–1 further clarifies that response rates may be measured, as appropriate, as compared to financial institutions of a similar size, type, and/or geographic reach, or other factors, as appropriate.

In response to commenters' concern that peer comparisons may not be an effective method to assess the reasonableness of a financial institution's procedures if all peers are not making reasonable efforts, the Bureau agrees that peer comparisons alone are not determinative. Comparing a financial institution's response rates to its peers is just one possible indicator of whether a financial institution has procedures reasonably designed to obtain a response. Even if a financial institution maintains a response rate commensurate with its peers, if all peers have low response rates overall or maintain procedures not reasonably designed to obtain a response, the financial institution may still violate § 1002.107(c). The Bureau does not believe it would be appropriate at this time, however, to set a specific percentage or metric for response rates, as suggested by some commenters, as the appropriate response rate may depend on a number of factors, differ from institution to institution, and change over time, for example, as financial institutions refine their collection methods.

Requests for Special Treatment for Particular Types of Transactions or Types of Financial Institutions

The Bureau is not adopting exceptions concerning the time and manner of collection of demographic information for particular types of transactions or by particular financial institutions, as requested by some commenters. For the reasons described below, the Bureau believes the same time and manner rules should apply across all covered credit transactions and all covered financial institutions.

Initially, the Bureau believes that point of sale transactions should follow the same rules as all covered credit transaction types, and thus does not believe that an exemption for such transactions, as suggested by some commenters, would be appropriate. The Bureau understands that many (though not all) point of sale applications, particularly those for smaller credit amounts or to purchase particular goods in a store, are submitted on-site at the point of sale and decisioned in real time. Many of the commenters' arguments for exclusion of point of sale transactions were identical to the arguments set forth by commenters above for why financial institutions should be permitted to collect 1071 data after decisioning an application, including arguments based on the speed and fast-paced nature of the application process, that applicants would be discouraged from responding or proceeding with the transaction, and that the person completing the application may lack the requisite knowledge. For the same reasons discussed above, the Bureau likewise does not believe that an exemption would be appropriate for point of sale transactions.

In response to commenters' concerns that applicants will not feel comfortable answering questions related to their ethnicity, race, and sex in a public place, the Bureau believes that financial institutions can develop procedures to accommodate collection in this setting, including by using the sample collection form developed by the Bureau (in paper or electronic format) or creating more private locations for the collection of data in-store. The Bureau also does not believe that specialized knowledge is necessary to collect these data, and believes that retailers and their employees can collect and maintain data with the necessary precautions to safeguard applicant information, as they do with other sensitive data provided in connection with a credit application. As to a commenter's argument that retailers will have limited motivation to collect small business lending data, the Bureau notes that a financial institution that retains a third party to offer its financial products has significant control and responsibility over how its products are offered, including the power and responsibility to require third-party partners to seek to collect required data and otherwise comply with applicable law. In response to a commenter's argument that data collected on point of sale transactions will reflect the retailer's, rather than the financial institution's, footprint, the Bureau notes that a financial institution chooses its retail partners. Finally, although some commenters asserted that the collection of 1071 data will deter applicants from seeking credit or retailers from providing in-store private label credit, they provided no evidence to support this claim.

Several commenters requested that if the Bureau includes point of sale or similar transactions in the final rule, the Bureau should nonetheless exempt such transactions under $50,000 or except such transactions from the requirement to obtain demographic data. These commenters stated that such an exemption would be consistent with FinCEN's customer due diligence rule, which excludes from certain of its requirements point of sale transactions to provide credit products solely for the purchase of retail goods/services up to a limit of $50,000. The Bureau is not adopting such an approach here, given the different purposes and requirements of the customer due diligence rule and section 1071. The purpose of FinCEN's rule is to improve financial transparency and prevent criminals and terrorists from misusing companies to disguise their illicit activities and launder their ill-gotten gains.[782] The

[782] *See* Fin. Crimes Enf't Network, *Information on Complying with the Customer Due Diligence (CDD) Final Rule, https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule* (last visited Mar. 20, 2023).

customer due diligence rule's exclusion for certain point of sale transactions is based on the ''very low risk posed by opening such accounts at [a] brick and mortar store.'' [783] While the customer due diligence rule focuses on accounts (including certain originated loans), obtaining data on denials is essential to section 1071's purposes. Moreover, unlike FinCEN's rule, which requires covered financial institutions to collect certain essential information, section 1071 only requires that financial institutions seek to collect applicants' protected demographic information, and permits applicants to refuse to provide that information. Given these key differences, the Bureau is not adopting an exclusion for point of sale applications below $50,000. See also the section-by-section analysis of § 1002.104, which discusses requests for minimum transaction amount thresholds.

Next, trade associations representing insurance premium finance lenders and insurance agents and brokers similarly argued that the Bureau's rule should not apply to insurance premium finance lenders, in part because such lenders cannot collect 1071 data until after funding. New § 1002.104(b)(3) excludes insurance premium financing, therefore resolving these commenters' concerns.

Finally, the Bureau does not believe it would be appropriate to categorically exclude captive vehicle finance lenders should be excluded from coverage. The commenter's request was primarily based on the argument that dealers—who primarily interact with applicants—are currently prohibited by ECOA from gathering certain protected demographic information. As further discussed in the section-by-section analysis of § 1002.109(a)(3), Regulation B issued by the Board of Governors of the Federal Reserve System (12 CFR part 202) and applicable to dealers provides in comment 5(a)(2)–3 that ''[p]ersons such as loan brokers and correspondents do not violate the ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to [HMDA] or another Federal or State statute or regulation requiring data collection.'' In response to the commenter's concern that dealers may not be familiar with all required data under section 1071, such as gross annual revenue or ownership structure information, the Bureau first notes that dealers are often the last entity with authority to set the material credit terms of the covered credit transaction, and so are generally unlikely to be collecting 1071 data on behalf of other reporting financial institutions. Second, even in situations where the dealer is acting as a mere conduit, and thus may be collecting information on behalf of another financial institution, the Bureau expects that the dealer can request 1071 data from the applicant, just like a covered financial institution would do. Finally, the commenter's concerns that data must be collected at each stage of the process, potentially by multiple covered financial institutions, may be misplaced; nothing in the proposed or final rule would require a financial institution (or a third party collecting data on its behalf) to collect data multiple times in connection with a single covered application.

107(d) Previously Collected Data

Proposed Rule

Proposed § 1002.107(c)(2) would have permitted, but not required, a financial institution to reuse previously collected data to satisfy proposed § 1002.107(a)(13) through (21) if the data were collected within the same calendar year as the current covered application and the financial institution had no reason to believe the data are inaccurate. The Bureau believed that, absent a reason to suspect otherwise, recently collected 1071 data are likely to be reliable.

Proposed comments 107(c)(2)–1 through –7 would have provided additional guidance and examples of when certain data can be reused by a financial institution, including what data can be reused, when information is considered collected in the same year, when a financial institution may have reason to believe data are inaccurate, and when a financial institution may reuse data regarding minority-owned business status, women-owned business status, and data on the principal owners' ethnicity, race, and sex.

The Bureau sought comment on § 1002.107(c)(2) and associated commentary.

Comments Received

The Bureau received comment on proposed § 1002.107(c)(2) from a range of lenders, trade associations, and community groups. A few commenters noted that it is commonplace for lenders to receive multiple applications from a borrower. For example, a community bank stated that it is typical for borrowers to submit numerous loan requests during the year, and expressed concern about what it referred to as ''repetitive completion'' of data points. A trade association similarly noted that financial institutions often have customers with multiple facilities, which may have been obtained all at once or over time.

Some commenters generally supported a provision that would allow financial institution to reuse certain data for some period of time. A community group supported allowing lenders to use previously collected data if an application is continued at a later date. However, the commenter urged against permitting reuse beyond a year, noting that the characteristics of the small business may change (such as revenue size).

In response to the Bureau's request for comment on the issue, a number of commenters urged the Bureau to adjust the time frame for reuse. A CDFI lender urged that, at a minimum, the Bureau update the time frame to ''within 12 months,'' rather than the same calendar year, noting that there is no reason to believe data are inaccurate for applications submitted close in time, but that fall between two calendar years. A trade association urged the Bureau to permit reuse for ''the same or prior calendar year.'' The commenter argued that permitting reuse of data would reduce applicant burden and that it would be unnecessarily restrictive to require financial institutions to collect anew previously obtained data that is still likely to be accurate. The commenter further noted that a financial institution can repopulate previously provided data, and the applicant can certify that the data are still accurate or update the data. A community bank argued that a one-year period was too short considering that its agricultural clients often annually reapply for draw down lines of credit (used to purchase crop inputs for the year), during which period a borrower's small business and principal owner status are unlikely to change.

A couple of community banks and group of trade associations urged the Bureau to permit reuse for a 24-month or two-year period. One of the banks stated that it is common for businesses to obtain a new product from a financial institution in the first three years, rather than the first year alone. Another trade association argued for a three-year reuse period. The commenter also argued that reuse should be permitted for any data the financial institution does not normally gather in connection with credit applications, such as data regarding minority-owned business status, women-owned business status,

[783] Fin. Crimes Enf't Network, *Guidance*, at Q 29 (Apr. 3, 2018), *https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf*.

and data on the principal owners' ethnicity, race, and sex, as well as gross annual revenue information if not typically collected. A community bank argued that if there are no changes to the data, a financial institution should be permitted to reuse data indefinitely. Finally, a community bank asserted that prior collected data should be reusable for the same amount of time across all data points, unless there is a reason to believe they are inaccurate. However, the commenter continued, reuse of gross annual revenue data should be updated every fiscal year and gender should be updated every year given that gender identity may change. The commenter asserted that ethnicity and race information about the principal owner(s) should not change absent a change in principal owner(s).

In contrast, a community groups, community-oriented lenders, and business advocacy groups, as well as an individual commenter opposed reuse of prior collected data in certain circumstances. The joint letter and the minority business advocacy group specifically opposed reuse of information about a principal owner's ethnicity, race, and sex information if the business previously responded "I do not wish to provide this information." The commenters asserted that opinions may shift, which may make a person more likely to provide the requested information. The commenters further noted that it is not a big burden on financial institutions to attempt to gather the information again and doing so goes to the purposes of section 1071. An individual commenter argued that the proposed reuse of previously collected data about an applicant's sex, sexual orientation and gender identification would have a negative impact on members of the LGBTQ community. The commenter was concerned that information collected for one purpose would be used for a non-intended purpose, such as to classify and segregate LGBTQ members applying for a small business loan. The commenter stated that by collecting data on an applicant's sex, sexual orientation, and gender identification, LGBTQ members are at risk that their data may be used for unintended purposes outside 1071 data collection.

In response to the Bureau's request for comment on whether financial institutions should be required to notify applicants that information they provide may be reused for subsequent applications, one community bank suggested the Bureau add a disclosure on the sample data collection form noting that the information may be reused, and if the information has changed, to inform the applicant's lender.

A community bank asked how the reuse provision could be implemented in light of the proposed firewall provision. The commenter noted that because the firewall provision prohibits review by underwriters of demographic information, it is unclear how a financial institution can reasonably rely on data collected in the same calendar year if that data is inaccessible to the lender. Another commenter asked for clarification whether data (specifically demographic data) collected in prior years could be reused, and what to do if there are multiple collections. Specifically, the commenter gave the example of an applicant that provides demographic information for one application, and then chooses not to provide demographic information for a subsequent application, and asking which collection should be reported.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(d) (proposed as § 1002.107(c)(2)) to permit, but not require, a financial institution to reuse previously collected data to satisfy § 1002.107(a)(13) through (20) if (a) the data were collected within the 36 months preceding the current covered application (except that to satisfy § 1002.107(a)(14), on gross annual revenue, the data must be collected within the same calendar year as the current covered application) and (b) the financial institution has no reason to believe the data are inaccurate. As discussed above, the majority of commenters to weigh in on this issue supported reuse of data for some period of time, with many commenters urging the Bureau to extend the time period for reuse from the same calendar year to multiple years. As noted by one bank, it is common for businesses to seek a new product within three years of a prior origination, with fewer requests occurring within one year. Allowing reuse will also reduce the need for applicants to repeatedly provide the same information over a short period of time, as noted by some commenters. The Bureau also believes permitting reuse will reduce burden on financial institutions, particularly those with an established relationship with a business. In addition, the Bureau believes that permitting reuse will assist in fast-paced transactions, such as requests for additional credit amounts on an existing account. Based on these reasons and the feedback from commenters, the Bureau now believes that 36 months strikes the appropriate balance of permitting reuse for a short enough period of time that the data are likely to be reliable, while also permitting a long enough period of reuse to avoid a financial institution from having to make repeated information requests to returning customers.

In response to a commenter's concern that characteristics of a small business may change during a time period greater than a year, the Bureau notes that any dramatic shifts will likely be known to a financial institution considering a new covered application. In those circumstances, the financial institution either will have already collected updated information (in which case the updated information would be reported pursuant to final comment 107(d)–4) or the financial institution will have reason to believe certain data are inaccurate, in which the case the financial institution cannot reuse that data pursuant to final § 1002.107(d)(2). Indeed, the Bureau believes that final § 1002.107(d)(2), the provision prohibiting reuse of data if the financial institution has reason to believe the prior collected data are inaccurate, will identify the majority of situations where the data are no longer reliable. For example, as set forth in final comment 107(d)–6, a financial institution may have reason to believe data are inaccurate if it knows that the applicant has had a change in ownership or a change in an owner's percentage of ownership. Similarly, a financial institution may also have reason to know data are inaccurate if the business indicates that is has opened several new store locations recently. In that case, the financial institution may have reason to ask for updated data on gross annual revenue, number of workers, and potentially other data points.

Some commenters raised concerns about reuse of data regarding a principal owner's race, sex, and ethnicity information, particularly if the business previously responded "I do not wish to provide this information." Another commenter stated that identities, and particularly gender identity, may shift, and so the information should be collected at least every year. The Bureau understands that how an applicant wishes to identify may shift over time. However, as noted above, the Bureau believes that a 36-month period provides the right balance of permitting reuse for a period of time to reduce repetitive collections, but also require financial institutions collect the data anew once a substantial amount of time has passed. Although the final rule permits reuse of applicant demographic data pursuant to final § 1002.107(d), final comment 107(d)–9 provides that a financial institution may not reuse data to satisfy § 1002.107(a)(18) and (19) unless the data were collected in connection with a prior covered application pursuant to subpart B. The Bureau believes that reuse of applicant demographic data should be limited in this manner to ensure that data reported were collected in a manner that aligns with the protections and selection options set forth in final § 1002.107(a)(18) and (19).

Although the Bureau is finalizing § 1002.107(d) to permit reuse of certain data collected within a 36-month period, the Bureau notes that a financial institution may—at any time, even outside a three-year period—use reasonable procedures to reaffirm data previously collected. The Bureau understands that many financial institutions have years of experience serving a particular small business's credit needs and so may seek to streamline new credit requests to avoid duplicative or unnecessary collection efforts. In this respect, it is important to note that the final rule does not prevent a financial institution from identifying efficient ways to gather 1071 required data, including by leveraging prior 1071 data to streamline the collection process. For example, even if it has been more than three years since a business submitted an application for credit, a financial institution may reaffirm prior collected data about whether the business is minority-owned, women-owned, and LGBTQI+-owned, and the ethnicity, race, and sex of the principal owners of the business by, for example, providing the applicant with a data collection form pre-populated with its prior responses and confirming with the applicant that the information remains accurate or making any changes noted by the applicant. Methods that reaffirm prior collected data may be particularly useful in faster-paced transactions, such as requests for additional credit amounts.

A bank asked how the reuse provision can be implemented in light of the proposed firewall provision, noting that because the firewall provision prohibits review by underwriters of demographic information, it is unclear how a financial institution can reasonably rely on previously collected data if it is inaccessible to the lender. The Bureau does not believe that the firewall provision in final § 1002.108 will conflict or render unusable the reuse provisions in final § 1002.107(d), as suggested by some commenters. Initially, the Bureau notes that the firewall provision only applies to information regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under § 1002.107(a)(18) and regarding the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19), but not other applicant-provided data. In any event, if an employee or officer is typically tasked with collecting data required under § 1002.107(a)(18) and (19), and is otherwise not involved in making any determination concerning a covered application, providing that employee with access to an applicant's prior responses to data requests under § 1002.107(a)(18) and (19) would not violate the firewall. Thus, final comment 108(a)–1(ii)(f) provides the example that reviewing previously collected data to determine if it can be used for a later covered application pursuant to § 1002.107(d) is not an activity that constitutes being involved in making a determination regarding a covered application. Finally, if a financial institution determines that it is not feasible to limit an employee's or officer's access to an applicant's prior responses to the financial institution's inquiries under final § 1002.107(a)(18) and (19) and provided the notice required under final § 1002.108(d) to the applicant at the time the data were collected, the financial institution can permit that employee or officer to reuse the collected data for a 36-month period as set forth in final § 1002.107(d).

In response to a commenter's question concerning what previously reported data can be used, and how to resolve conflicting answers provided at different times, the Bureau notes that final comment 107(d)–4 provides that a financial institution should use updated information if available.

In response to its request for comment on the issue in the NPRM, the Bureau received feedback from an industry commenter that the sample data collection form should include a disclosure that information can be reused for section 1071 reporting purposes, and that an applicant should inform its lender if there have been any changes. The Bureau is finalizing the sample data collection form without a disclosure about potential reuse of data. Including such language could distract an applicant from other language on the form (such as why the data is being collected) and risks potentially confusing an applicant, who might not understand that reuse is limited to 1071. Relatedly, the collection form accurately identifies why the information is being collected whether or not the data are later reused—to help ensure that all small business applicants are treated fairly and that communities' small business credit needs are being fulfilled.

Final comment 107(d)–1 (proposed as comment 107(c)(2)–1) is revised to clarify that reuse of data pursuant to final § 1002.107(d) is limited to reuse for the purpose of reporting such data pursuant to § 1002.109. In response to an individual commenter's concern about potential misuse of 1071 data, the Bureau has adopted new § 1002.110(e), which prohibits a financial institution from disclosing or providing to third parties the information it collects pursuant to final § 1002.107(18) and (19) except in limited circumstances. In addition, financial institutions remain prohibited from using 1071 data—particularly data about whether the business is minority-owned, women-owned, or LGBTQI+-owned, and the ethnicity, race, and sex of the principal owners of the business—in a manner that violates ECOA, existing Regulation B, or any other applicable law. For example, existing § 1002.4(a) prohibits a creditor from discriminating against an applicant on a prohibited basis in any aspect of a credit transaction. Similarly, existing § 1002.6(b)(1) prohibits a creditor from taking a prohibited basis into account in any system of evaluating the creditworthiness of an applicant, except as expressly provided for by ECOA or Regulation B. Thus, just because this final rule gives a financial institution permission to *collect* ethnicity, race, and sex/gender information for the limited purposes of section 1071, a financial institution still remains prohibited from *considering* that data in a manner that violates ECOA, existing Regulation B, or any other applicable law.

Final comments 107(d)–2 and –3 (proposed as comments 107(d)–2 and –3) contain minor revisions for consistency and clarity. Final comment 107(d)–2 identifies the particular data that can be reused. The comment also clarifies that other data required by final § 1002.107(a) cannot be reused, as those data points are specific and unique to each covered application. Final comment 107(d)–3 clarifies instances where data have not been "previously collected" and so cannot be reused under final § 1002.107(d).

The Bureau is adopting new comment 107(d)–4 to clarify that if a financial institution obtains updated information relevant to the data required to be collected and reported pursuant to final § 1002.107(a)(13) through (20), and the applicant subsequently submits a new covered application, the financial institution must use the updated information in connection with the new covered application or seek to collect the data again. Final comment

107(c)(2)–4 also provides an example of updated information.

Final comment 107(d)–5 (proposed as comment 107(c)(2)–4) is revised to provide guidance on how to measure the 36-month period for potential reuse of certain data, and provides an illustrative example.

Final comment 107(d)–6 (proposed as comment 107(c)(2)–5) contains minor revisions for consistency and clarity, and an example of when a financial institution has reason to believe data may be inaccurate and so cannot be reused for a subsequent covered application.

As noted above, final § 1002.107(d)(1) permits a financial institution to reuse gross annual revenue data if collected within the same calendar year as the current covered application. The Bureau is adopting a narrower window for the reuse of gross annual revenue data than other previously collected data given the language in ECOA section 704B(e)(2)(F) requiring financial institutions to compile "gross annual revenue of the business in the last fiscal year . . . preceding the date of the application." Given that the statute identifies a specified time frame for the collection of gross annual revenue, it would be more consistent with the statute to permit reuse of gross annual revenue only within the same calendar year. Moreover, given that gross annual revenue data already looks back to the prior fiscal year, adding an additional 36-month period could affect data quality. The Bureau is also adopting new comment 107(d)–7 to provide guidance on when gross annual revenue information is considered collected in the same calendar year, and so may be reused by a financial institution in certain circumstances. In particular, the comment discusses applications that span more than one calendar year.

The Bureau is adopting new comment 107(d)–8 to clarify that if a financial institution decides to reuse data about the applicant's time in business, the financial institution must update the data to reflect the passage of time, and provides an illustrative example.

Lastly, final comment 107(d)–9 (proposed as comments 107(c)(2)–6 and –7) is revised to provide guidance on when data regarding minority-owned business status, women-owned business status, LGBTQI+-owned business status, and data on the principal owners' ethnicity, race, and sex may be reused by a financial institution in a subsequent covered application.

Section 1002.108 Firewall

Background

ECOA section 704B(d) generally limits the access of certain individuals at a financial institution or its affiliates to certain information provided by an applicant pursuant to section 1071. The Bureau calls this requirement in 704B(d) to limit access to information a "firewall."

More specifically, ECOA section 704B(d)(1) states that "[w]here feasible," underwriters and other officers and employees of a financial institution or its affiliates "involved in making any determination concerning an application for credit" cannot have access to any information provided by the applicant pursuant to a request under 704B(b). That is, the statute limits access not only by underwriters and persons making an underwriting decision but also by anyone else involved in making any determination concerning an application. However, it does not expressly define the term "feasible" or provide clarification regarding what it means to be "involved in making any determination concerning an application for credit."

Additionally, under ECOA section 704B(d)(2), if a financial institution determines that an underwriter, employee, or officer involved in making a determination "should have access" to any information provided by the applicant pursuant to a request under 704B(b), the financial institution must provide a notice to the applicant of the underwriter's access to such information, along with notice that the financial institution may not discriminate on the basis of such information. Section 704B(d)(2) does not expressly define or describe when an underwriter, employee, or officer "should have access," nor does it explain the relationship, if any, between when a financial institution determines that an individual "should have access" under 704B(d)(2) and whether it is "feasible" to implement and maintain a firewall under 704B(d)(1).

Proposed Rule

Scope of the firewall. In the NPRM, the Bureau explained its belief that section 1071 is ambiguous with respect to the meaning of "any information provided by the applicant pursuant to a request under subsection (b)." On the one hand, ECOA section 704B(b)(1) directs financial institutions to inquire whether a business is "a women-owned, minority-owned, or small business," so the phrase could be interpreted as referring only to these three data points. However, section 704B(e) indicates that the scope of 704B(b) is much broader. It instructs financial institutions that "information provided by any loan applicant pursuant to a request under subsection (b) . . . shall be itemized in order to clearly and conspicuously disclose" data including the loan type and purpose, the amount of credit applied for and approved, and gross annual revenue, among other things. In other words, 704B(e) designates all of the information that financial institutions are required to compile and maintain—not simply an applicant's status as a women-owned, minority-owned, or small business—as information provided by an applicant "pursuant to a request under subsection (b)."

Information deemed provided pursuant to 704B(b) is subject not only to the firewall under 704B(d) but also to a right to refuse under 704B(c) and separate recordkeeping requirements under 704B(b)(2). Applying these special protections to many of the data points in 704B(e), such as an applicant's gross annual revenue or the amount applied for, would be extremely difficult to implement because this information is critical to financial institutions' ordinary operations in making credit decisions.

In order to resolve these ambiguities, the Bureau gave different meanings to the phrase "any information provided by the applicant pursuant to a request under subsection (b)" with respect to ECOA section 704B(e) as opposed to 704B(b)(2), (c), and (d). With respect to the scope of the firewall, the Bureau interpreted the phrase to refer to the data points in proposed § 1002.107(a)(18) (minority-owned business status) and proposed § 1002.107(a)(19) (women-owned business status), as well as proposed § 1002.107(a)(20) (ethnicity, race, and sex of principal owners). None of these data points has any bearing on the creditworthiness of the applicant. Moreover, a financial institution generally could not inquire about this demographic information absent section 1071's mandate to collect and report the information, and ECOA prohibits a financial institution from discriminating against an applicant on the basis of the information. Thus, the Bureau believed that the best effectuation of congressional intent was to apply section 1071's limitation on access and right to refuse provisions to all demographic information collected pursuant to section 1071 and not to whether an applicant is a small business or any of the non-demographic data points proposed in § 1002.107(a).

Accordingly, the Bureau proposed that financial institutions need only limit access under ECOA section 704B(d) to an applicant's responses to the financial institution's specific inquiries regarding women-owned business status and minority-owned business status and the ethnicity, race, and sex of principal owners, but not to an applicant's small business status.[784] Additionally, the proposal would have clarified that this prohibition on allowing certain employees and officers to access certain information does not extend to ethnicity or race information about principal owners that the financial institution collects via visual observation or surname. It would have also clarified that the prohibition does not extend to an applicant's responses to inquiries regarding demographic information made for purposes other than data collection pursuant to section 1071 or to an employee's or officer's knowledge due to activities unrelated to the inquiries made to satisfy the financial institution's obligations under section 1071 (*e.g.,* an employee knows that the applicant is a minority-owned business or women-owned business due to information provided to qualify for a special purpose credit program or an officer knows a principal owner's ethnicity, race, or sex due to participation in a community group or association).

As noted above, section 1071 prohibits access to certain information by underwriters and other officers and employees of a financial institution or its affiliates ''involved in making any determination concerning an application for credit.'' Consistent with the statute, the Bureau proposed that a financial institution need only prohibit the access of an employee or officer to demographic information pursuant to section 1071 if that employee or officer is involved in making a determination concerning an applicant's covered application. The Bureau further proposed defining the phrase ''involved in making any determination concerning a covered application'' to mean participating in a decision regarding the evaluation of a covered application, including the creditworthiness of an applicant for a covered credit transaction. The NPRM noted that this group of employees and officers includes, but is not limited to, employees and officers who serve as underwriters. Additionally, the NPRM would have explained that the decision that the employee or officer makes or participates in must be about a specific covered application. An employee or officer would not be involved in making a determination concerning a covered application if the employee or officer is involved in making a decision that affects covered applications generally, the employee or officer interacts with small businesses prior to them becoming applicants or submitting a covered application, or the employee or officer makes or participates in a decision after the financial institution has taken final action on the application, such as decisions about servicing or collecting a covered credit transaction.

Feasibility of establishing and maintaining a firewall. In the NPRM, the Bureau also noted that ECOA section 704B(d) contains significant ambiguities with respect to how financial institutions, in practical terms, should determine how to implement a firewall to limit access to certain information provided by applicants pursuant to section 1071. Indeed, based on feedback from stakeholders during the SBREFA process, it appeared that in many instances financial institutions that find it not ''feasible'' to implement and maintain a firewall will be the same institutions determining that relevant individuals ''should have access'' to the information provided by an applicant pursuant to 704B(b). The Bureau believed that reading these two provisions in isolation from each other would likely result in significant confusion and challenges, particularly for smaller financial institutions.

Accordingly, the Bureau proposed that section 1071's firewall requirement be implemented by reading the ''should have access'' language in ECOA section 704B(d)(2) in conjunction with the ''feasibility'' language in 704B(d)(1). As proposed, it *would not be feasible* for a financial institution to implement and maintain a firewall with respect to a given employee or officer involved in making a determination concerning a covered application if the financial institution determines that employee or officer should have access to one or more of the applicant's responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20). Conversely, it *would be feasible* for a financial institution to implement and maintain a firewall if the financial institution determines that no employee or officer involved in making a determination concerning a covered application should have access to the applicant's responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20). Thus, the Bureau proposed that the prohibition on certain individuals accessing information as set forth in proposed § 1002.108(b) would not apply to an employee or officer if the financial institution determines that it is not feasible to limit that employee's or officer's access to one or more of an applicant's responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20), and the financial institution provides the notice required under proposed § 1002.108(d) to the applicant.

The Bureau further proposed that it is not feasible to limit access as required pursuant to proposed § 1002.108(b) if the financial institution determines that an employee or officer involved in making any determination concerning a covered application should have access to one or more applicants' responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20). The Bureau proposed to define the phrase ''should have access'' to mean that an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform that employee's or officer's assigned job duties. As proposed, a financial institution may determine that an employee or officer should have access for purposes of proposed § 1002.108 if that employee or officer is assigned one or more job duties that may require the employee or officer to collect (based on visual observation, surname, or otherwise), see, consider, refer to, or use information otherwise subject to the prohibition in proposed § 1002.108(b). The employee or officer would not have to be required to collect, see, consider, refer to or use such information or to actually collect, see, consider, refer to or use such information. It would be sufficient if the employee or officer might need to do so to perform the employee's or officer's assigned job duties. Additionally, a financial institution may determine that all employees or officers with the same job description or assigned duties should have access for purposes of proposed § 1002.108. However, if a financial institution determines that one or more employees or officers involved in making any determination concerning a covered application should have access for purposes of proposed § 1002.108, the financial institution would have been responsible for ensuring that the employees or officers only access and use the protected information for lawful purposes.

Exception to establishing and maintaining a firewall. As explained above, the Bureau proposed to implement the statutory exception to the requirement to establish and maintain a firewall in § 1002.108. The

[784] SBREFA Outline at 36–37.

exception would allow financial institutions to give certain employees or officers access to protected demographic information if the financial institution determines that they should have access to that information. However, in such circumstances, the financial institution would need to comply with the statutory requirement to provide a notice in lieu of limiting access. Thus, the Bureau proposed that, in order to satisfy the exception, as set forth in proposed § 1002.108(c), a financial institution would be required to provide a notice.

The Bureau proposed that the financial institution be required to provide the notice to, at least, each applicant whose responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20) would be accessed by an employee or officer involved in making a determination concerning that applicant's covered application. As an alternative, the Bureau proposed that the financial institution could provide the required notice to a larger group of applicants, including all applicants, if it determines that one or more officers or employees should have access to protected demographic information.

The Bureau further proposed that the notice provided to satisfy the exception in proposed § 1002.108(c) must inform the applicant that one or more employees and officers involved in making determinations concerning the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, its women-owned business status, and its principal owners' ethnicity, race, and sex. The Bureau proposed language for the required notice and stated that a financial institution would be required to use the language set forth in proposed comment 108(d)–2 or substantially similar language when providing the notice.

The Bureau also proposed timing requirements for providing the notice. The Bureau proposed that, if the financial institution provides the notice orally, it must provide the notice prior to asking the applicant if it is a minority-owned business or women-owned business and prior to asking for a principal owner's ethnicity, race, or sex. If the financial institution provided the notice on the same paper or electronic data collection form as the inquiries about minority-owned business status, women-owned business status, and the principal owners' ethnicity, race, or sex, the financial institution would have been required to provide the notice at the top of the form. If the financial institution provided the notice required by proposed § 1002.108(d) in an electronic or paper document that is separate from the data collection form inquiring about the applicant's minority-owned business status, its women-owned business status, and its principal owners' ethnicity, race, and sex, the financial institution would have been required to provide the notice at the same time as or prior to providing the data collection form. Additionally, the NPRM would have clarified that the notice required pursuant to proposed § 1002.108(d) must be provided with the non-discrimination notices required pursuant to proposed § 1002.107(a)(18) through (20).

Requests for comment. The Bureau sought comment on its proposed approach to the statutory firewall requirement and whether a different approach might result in a better policy outcome. The Bureau also sought comment on the scope of the proposed firewall requirement and the exception to establishing and maintaining a firewall. The Bureau specifically sought comment on whether the proposed firewall should apply to information about principal owners' ethnicity and race that is obtained via visual observation and/or surname analysis. Finally, the Bureau generally requested comment on whether additional clarification is needed regarding the firewall requirement.

Comments Received

The Bureau received comments on its proposed approach to the firewall requirement from a wide range of commenters including lenders, trade associations, business advocacy groups, community groups, small business owners and other individuals, and members of Congress. A majority of these comments addressed the feasibility of establishing and maintaining a firewall and/or addressed the notice required to rely on the exception. Numerous commenters sought the elimination of or exemptions to the firewall requirement. Other commenters sought additional guidance on some or all of the firewall provisions, including the scope of the firewall and determining who "should have access" to the protected information.

General. A community group commenter said that the proposed firewall provisions appropriately protect applicants, and another stated that the formulation of the proposed firewall provisions was reasonable. A CDFI lender said that while smaller financial institutions might not be able to establish and maintain a firewall, the NPRM provided sufficient flexibility in its firewall provisions to facilitate implementation. A women's business advocacy group encouraged the Bureau to look at ways to make a more secure firewall and noted that the feasibility standard in the proposed rule seemed to remove the firewall's effectiveness. Another commenter cautioned that the proposed firewall would not stop lenders from using information inappropriately and in a manner that harms small business applicants.

In contrast, a large number of lenders, trade associations, and individual commenters requested that the Bureau eliminate the firewall. Some of these commenters said that the firewall should be eliminated because it would create competitive disadvantages or overburden certain financial institutions. Others said that it should be eliminated because the firewall would overburden all covered financial institutions. Many commenters said that the firewall will add complexity, create burden and regulatory risk, and/or increase the cost of compliance. A few commenters said that the firewall provisions could result in financial institutions being required to purchase or create new technology or systems. Some commenters noted that the additional expense could result in an increased cost of credit, limited access to credit, and/or the cessation of certain products being offered. One commenter further stated that the costs of such a requirement would likely decimate small businesses' access to credit because financial institutions will either decrease or stop their small business lending.

One bank commenter asked that the Bureau create a simple way for the commenter to certify that the firewall concept cannot work for its entire institution without exception, equivocation, or a repetitive review. This commenter further indicated that it would provide a short and simple disclosure (one half of a letter size page or less) to all of its commercial applicants to document its compliance. The commenter said that the proposed firewall requirements gave it concern and appeared to be a "gotcha" clause in the proposed rule. In particular, they indicated it was concerned with a portion of proposed comment 108(c)–1 that would have said that a financial institution cannot permit all employees and officers to have access simply because it has determined that one or more employees or officers should have access.

Some commenters said that they had not been able to devise a workable method for improving what they called the firewall's "prohibit-or-disclose regime," and suggested that the Bureau needed to exercise its statutory authority to eliminate the firewall provision. These commenters and others also noted that eliminating the firewall requirement would align the rule implementing section 1071 with HMDA/Regulation C, which they said has required collection of demographic information for decades without any known incidents, despite the absence of any firewall.

Some commenters said that the Bureau should eliminate the firewall because it is unnecessary. A commenter also noted that the firewall requirement presents unique compliance challenges because the requirement is different than HMDA and will require unique systems. A few commenters said that the firewall serves no purpose or has no practical value. A few other commenters noted that the firewall is impractical or serves no purpose when applications are not anonymous, such as in smaller communities or where the employee or officer making determinations has an existing relationship with the applicant.

A few commenters asked the Bureau to create a platform, portal, or other system for applicants to report demographic information directly to the Bureau so that financial institutions could avoid having to intake such information at all.

Scope of the firewall. Comments on the scope of the proposed firewall requirement largely requested clarification. These commenters requested additional guidance regarding the types of employees and officers that would be subject to the firewall with one commenter asserting that the standard in the proposed rule was vague and subjective. This commenter also requested additional clarity regarding the definition of the phrase "involved in making any determinations concerning an application for credit." Some commenters requested that specific groups of employees (such as software engineers and data scientists, bankers and managers who provide information or counseling on available credit products, and employees who gather information and submit applications to unrelated financial institutions who may take assignments of the credit contract) explicitly be excluded from the scope of the firewall requirement. However, a trade association said it supported the proposed definition of the phrase "involved in making any determination concerning a covered application."

One commenter specifically agreed that the firewall should not extend to an applicant's status as a small business.

Regarding application of the proposed firewall requirement to demographic information collected via visual observation or surname, one commenter requested guidance on how to comply with the firewall for such information. Another commenter urged the Bureau not to include information collected via visual observation or surname within the scope of the firewall. In contrast, another commenter noted that if the firewall is meant to prevent a credit decision based on protected information, it should not matter how the demographic information is collected.

Some commenters requested clarification or guidance regarding the firewall's applicability to information collected pursuant to HMDA or other laws or regulations. One commenter said that an employee or officer should not be subject to the firewall if the employee or officer accessed demographic information collected pursuant to section 1071 in order to satisfy HMDA or another regulatory requirement.

A commenter said that the firewall should only apply to applications originated completely online.

Feasibility of establishing and maintaining a firewall. A significant majority of the comments about the firewall provisions specifically addressed the feasibility of establishing and maintaining a firewall. Overwhelmingly, these commenters said that the firewall would be impossible, difficult, inefficient, and/or costly to implement for certain financial institutions.

Numerous commenters said that the firewall is not or may not be feasible for smaller institutions, such as credit unions and other community-based financial institutions with limited staff and resources. Numerous commenters also said that the firewall would not be workable with some business models, loan processes, and/or decision-making structures. Specifically, commenters asserted that the firewall would be impossible or impractical with high-contact and relationship-based lending models and with lending models that rely on loan officers to collect information from applicants. One commenter said that the logistics of implementing a firewall would be too much for most lenders.

While some commenters said that the firewall requirement would unfairly burden and punish smaller financial institutions or traditional financial institutions in favor of larger financial institutions and online lenders, others said that the firewall may not be feasible for larger institutions or online lenders. Specifically, some commenters said that the firewall would not be feasible for larger institutions because they would have to make substantial investments in technology to implement a firewall. One commenter said that while it was a larger financial institution, its business lending department was small, which would make establishing and maintaining a firewall impossible, infeasible, or burdensome.

Many commenters said that lenders would need to change their operations, hire additional staff, reconfigure systems, and/or invest significant sums in technology in order to establish and maintain a firewall. Some commenters asserted that the costs of doing these things may be prohibitive. A few commenters said that the firewall would disrupt their process, and one commenter said that the firewall requirement could diminish a loan officer's ability to fully engage with their clients efficiently and timely. With regard to indirect vehicle financing, a few commenters said that there is not currently a mechanism to shield and transmit data for such transactions and noted there would be a one-time cost exceeding $4 million to develop such a mechanism.

Some commenters requested additional clarification or guidance on the feasibility standard. A few commenters specifically requested a clearer feasibility standard. Some recommended that the Bureau provide clear guidance about when a firewall is or is not feasible and how a covered financial institution may determine the feasibility of establishing and maintaining a firewall. A few commenters said that the Bureau should clarify the operational factors (such as existing staffing, software capability, other existing systems and operations, and costs of making changes) that a financial institution may consider when determining feasibility and when an employee or officer should have access to protected demographic information collected pursuant to section 1071. Two of these commenters requested that the commentary specifically state that a financial institution may determine that a firewall is not feasible if it would need to hire additional staff in a line of business. Another commenter said that a financial institution should be permitted to consider department size in determining feasibility.

Two commenters said that the Bureau should expressly state that a financial institution has discretion to determine when a firewall is or is not feasible. These commenters further said that a financial institution's determination that a firewall is not feasible should be

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left to the sole and exclusive discretion of financial institutions, effectively creating a safe harbor for institutions' determinations of feasibility. Another commenter said that the Bureau should also consider adding a feasibility-related safe harbor provision in § 1002.112(c) that allows for variations in determining feasibility. Other commenters recommended that a determination of feasibility or infeasibility should satisfy the rule if done in conformity with written procedures. Finally, one commenter said that it did not believe that the Bureau could create a feasibility standard that would allow a financial institution to determine whether it is required to implement a firewall pursuant to the rule.

Providing a notice in lieu of establishing and maintaining a firewall. A significant number of the commenters who said that it would not or may not be feasible to implement and maintain a firewall also opposed providing a notice in lieu of establishing and maintaining a firewall. Generally, commenters said that the notice may raise privacy concerns among some applicants, create confusion, and/or create competitive disadvantages for financial institutions that provide the notice. Some commenters said that requiring a notice would create an additional compliance and/or administrative burden, and one said that the notice may slow down the loan process because financial institutions will need to explain the required language. Several commenters said that the notice could cause customer complaints (as well as customer confusion) if some financial institutions are not required to provide the notice. Several commenters said that applicants may want to obtain loans from financial institutions that do not provide the notice, and some said this ultimately could result in a reduction of applicant choice, a reduction of applicant access to credit, or increased cost of credit.

A number of commenters said that providing the applicant with notice of the fact that their demographic data will be shared could raise questions or suspicions of whether the data plays a role in credit decisions or doubts about the impartiality of the credit decision, or could cause unwarranted scrutiny from individuals receiving the notice. Some commenters said that the notice may cause applicants to think the financial institution is not adequately staffed or cannot maintain the confidentiality of applicant information. One commenter suggested that the language of the proposed notice is inflammatory. Another commenter said that the proposed notice implied that some financial institutions are inherently more likely to engage in unfair lending, to the extent that a ''government warning'' is necessary. The commenter further stated that this implication is an unwarranted insult to the integrity and fairness of the shareholders and management of smaller community banks, and they would most likely prefer to withdraw from or significantly curtail small business lending than rely on the proposed exception to the firewall requirement by providing the notice.

Different commenters identified financial institutions that would need to provide the notice as smaller financial institutions, mid-sized financial institutions, community banks, credit unions, or more traditional financial institutions (*i.e.,* not online lenders). However, one commenter predicted that lenders of many sizes, business models, and regulatory levels will conclude that employees and officers involved in making a determination concerning an application should have access to demographic information collected under section 1071 and provide the notice.

A number of commenters suggested that the notice could inhibit the collection of demographic information and/or undercut section 1071's statutory purposes because it might influence applicants not to provide the requested information. One commenter said the notice might result in more applicants at community banks opting not to provide their demographic information, and in turn, more community banks having to report ethnicity and race information based on visual observation or surname. Another commenter said that providing the notice may affect an applicant's willingness to provide demographic information as the notice gives the perception that the information would likely be used to discriminate. Likewise, some commenters said that providing the notice to qualify for the firewall exception at the same time as the non-discrimination notice is especially problematic and could result in applicants declining to provide the requested information. Some commenters said that giving the notices together could result in other harms, such as harm to existing customer relationships. Two commenters suggested that the notice requirement is counterproductive because applicants may be less inclined to provide demographic information if they are told that decision makers may access their demographic information.

A bank said that the Bureau should eliminate the notice because applicants will know that the person making the inquiries pursuant to section 1071 will be making determinations regarding applications. Another bank said that the notice is useless because no one reads disclosures, and customers already know that lenders cannot discriminate.

A few commenters requested specific revisions to the notice. One commenter said that the Bureau should revise the notice to align with a HMDA notice. Another commenter requested that the Bureau align the notice with the disclosure used for HMDA and stated that this means that the disclosure would be provided with requests for demographic information on covered applications, regardless of whether the financial institution can maintain a firewall, and would emphasize that the information is being requested/collected for government monitoring of lenders' fair lending performance and compliance, cannot influence credit decisions, and is voluntary for applicants to provide. A third commenter said that in lieu of having a firewall requirement, the Bureau should develop a model disclosure to applicants explaining the data gathering process, similar to the disclosure provided in the government monitoring section of the home mortgage application.

A commenter said that the Bureau should exercise its authority to allow institutions to provide a Bureau-developed disclosure to applicants explaining that there may be access to the data and explain that the institution must not discriminate based on the information. The commenter further said that the Bureau should develop and provide the disclosure in Spanish as well as English when it publishes the final rule and add other translations over time.

A trade association supported the Bureau's proposal to develop model disclosures that lenders could use when notifying applicants of an employee's or officer's access to personal information. Another trade association supported an exception to the firewall requirement and a model disclosure that alerts applicants that an employee or officer may have access to demographic information, but does not tell applicants that such individuals will have access to such information. Two other commenters supported allowing financial institutions to provide a notice to applicants in lieu of restricting access to applicants' protected demographic information if a financial institution determines that it is not feasible to limit access to one or more of an applicant's responses to the financial institution's inquiries. A community group commenter said that the notice is an important aspect of the proposed rule.

Requests for exemptions from the firewall requirements. Many commenters requested that the Bureau exempt certain financial institutions from the firewall requirement, though not all commenters agreed on which institutions should be exempted. One commenter requested an exemption for financial institutions with assets of less than $1.384 billion (the CRA small bank threshold as of January 1, 2022),[785] and another for institutions with assets of less than $5 billion. A few commenters said that financial institutions with assets of less than $10 billion should be exempted. Other commenters said that "smaller" or "community based institutions" or "community banks" or "credit unions" should be exempted. One commenter said that community banks should be exempt from the notice requirement.

Other commenters said that certain institutions should be provided an "automatic" exception to the firewall, such that smaller institutions could avoid the analysis and documentation required to show that an institution qualifies for the exception.

Several commenters said that, due in whole or in part to the firewall requirement, certain institutions should be exempted from the entire rule. One commenter said that banks under $1 billion should be exempted on this basis, a few said community banks should be exempted on this basis, and one commenter said that all but the largest lenders or all depository lenders should be exempted.

One commenter said that as an alternative to exempting community banks from the firewall requirement, the Bureau could require all financial institutions to provide the notice to all applicants, regardless of whether information is firewalled.

Final Rule

For the reasons set forth herein, the Bureau is generally finalizing the firewall requirement with additional clarifications in the commentary regarding the definitions of "involved in making any determination concerning a covered application" and "should have access," the scope of the firewall, determining feasibility, the nature of the exception, and applying the exception to a specific employee or officer or group of similarly situated employees or officers. In addition, the Bureau has eliminated the requirement to use specific language when providing the notice required to qualify for the exception and, instead, has provided sample language for the notice. This sample language appears in the sample data collection form at appendix E. The Bureau has also revised the firewall provisions to align with other changes to the final rule, such as the inclusion of LGBTQI+-owned business status collected pursuant to final § 1002.107(a)(18) as protected demographic information subject to the firewall and the elimination of the requirement to collect certain information via visual observation or surname.

Final § 1002.108(b) states the general prohibition on access to applicants' protected demographic information by certain persons. The Bureau is finalizing § 1002.108(b) and comments 108(b)–1 and 108(b)–2 with changes for clarity and consistency with other portions of the final rule. Specifically, § 1002.108(b) has been revised to include LGBTQI+-owned business status, and cross-references have been updated to reflect changes elsewhere in the final rule. Final § 1002.108(b) states that unless the exception under final § 1002.108(c) applies, an employee or officer of a covered financial institution or a covered financial institution's affiliate shall not have access to an applicant's responses to inquiries that the financial institution makes pursuant to this subpart regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under final § 1002.107(a)(18), and regarding the ethnicity, race, and sex of the applicant's principal owners under final § 1002.107(a)(19), if that employee or officer is involved in making any determination concerning that applicant's covered application. Comments 108(b)–1 and –2 have been re-ordered. Final comment 108(b)–1 and final comment 108(b)–2 have been revised to clarify the scope of the prohibition.

While many commenters said that the Bureau should eliminate the firewall requirement, or should exempt certain covered financial institutions or certain types of transactions from the firewall requirement, the Bureau does not believe it is appropriate to abrogate this statutory requirement through section 1071's general exception authority beyond the exception provided in the statutory firewall provision itself. Congress, which would have been aware of the HMDA data collection regime (including its lack of a firewall) at the time that section 1071 was enacted, specifically required that financial institutions limit certain employees' and officers' access to demographic information that financial institutions request from applicants in order to comply with section 1071. While Congress allowed an exception to the general requirement to establish and maintain a firewall in certain circumstances (*i.e.,* when the financial institution determined that an employee or officer should have access to the demographic information and a firewall would not be feasible), the language of the statute suggests that Congress did not intend for the Bureau to eliminate the prohibition on access more broadly. Furthermore, Congress only authorized the Bureau to create exceptions to the requirements in section 1071 where necessary or appropriate to carry out section 1071's purposes. The Bureau does not believe that eliminating the firewall is necessary or appropriate to carry out section 1071's purposes.

Moreover, the Bureau believes that it has separately addressed many of the concerns about the ability of smaller institutions and institutions with limited staff to implement a firewall in other sections of the final rule. In particular, the Bureau has increased the origination threshold for coverage in § 1002.105(b). As a result, many smaller institutions and institutions with limited staff will not be subject to any provisions of the final rule, including the firewall requirement.

Because the requirement to collect certain information via visual observation or surname is not included in final § 1002.107(a)(19), it is not necessary to address the comments about the applicability of the firewall requirements to information collected via those methods. The Bureau has accordingly removed references to collecting information via visual observation or surname from final comments 108(a)–2.i and 108(b)–2.ii. Similarly, because HMDA reportable loans are excluded transactions pursuant to final § 1002.104(b)(2), it is not necessary to address comments asking for guidance on how to apply the firewall requirement if a loan is subject to both HMDA and this final rule.

Regarding comments that the Bureau establish a platform or system that applicants can use to report demographic data directly to the Bureau, thereby eliminating the need for institutions to implement a firewall, in line with its discussion of this issue in the section-by-section analysis of § 1002.107(a)(19), the Bureau does not

[785] Bd. of Governors of the Fed. Rsrv. Sys. & Fed. Deposit Ins. Corp., *Agencies release annual asset-size thresholds under Community Reinvestment Act regulations* (Dec. 16, 2021), *https://www.federalreserve.gov/newsevents/pressreleases/bcreg20211216a.htm;* Fed. Fin. Insts. Examination Council, *Explanation of the Community Reinvestment Act Asset-Size Threshold Change* (Dec. 16, 2021), *https://www.ffiec.gov/cra/pdf/2022_Asset_Size_Threshold.pdf.*

intend to create such a system at this time but is open to engaging further with stakeholders on alternative approaches for how financial institutions might collect and report protected demographic information.

Final § 1002.108(a) provides certain relevant definitions, including the definition of the phrase ''involved in making any determination concerning a covered application from a small business.'' Generally, the Bureau is finalizing the definition of the phrase ''involved in making any determination concerning a covered application'' in § 1002.108(a)(1) with revisions for clarity. The Bureau also is revising comment 108(a)–1 to provide additional clarity that the covered application must be from a small business and to provide clarity and examples regarding which employees and officers are subject to the prohibition set out in final § 1002.108(b) and which employees and officers are not subject to the prohibition. In response to the comments, the Bureau has clarified that certain activities do not constitute being involved in making a determination concerning a covered application from a small business and that other activities do constitute being involved in making such determinations.

While the Bureau recognizes that the ''involved in making any determination concerning an application for credit'' standard that Congress created in the statute is broad, the Bureau does not believe that the standard in final § 1002.108(a)(1), as further explained in the commentary, is unduly vague or subjective, as asserted by some commenters.

As explained in final comment 108(a)–1.i, an employee or officer is involved in making a determination concerning a covered application from a small business for purposes of final § 1002.108 if the employee or officer makes, or otherwise participates in, a decision regarding the evaluation of a covered application or the creditworthiness of a small business applicant for a covered credit transaction. Final comment 108(a)–1.i also explains that the decision that an employee or officer makes or participates in must be about a specific covered application or about the creditworthiness of a specific applicant. Thus, activities undertaken prior to the submission of a covered application do not constitute being involved in making a determination about a covered application. Similarly, activities undertaken after a financial institution has taken final action on a covered application do not constitute making a determination regarding a covered application. Furthermore, an employee or officer is not involved in making a determination concerning a covered application if the employee or officer is only involved in making a decision that affects covered applications generally. Finally, the comment clarifies that an employee or officer may be participating in a determination even if the employee or officer is not the ultimate or sole decision maker and provides examples.

Additionally, in response to comments requesting further clarification regarding the definition of the statutory phrase ''involved in making any determination concerning an application for credit,'' the Bureau has added several examples to the list of the types of activities in final comment 108(a)–1.ii that do not constitute being involved in making a determination concerning a covered application from a small business for purposes of § 1002.108. The Bureau has also added a list of examples in comment 108(a)–1.iii of the types of activities that do constitute being involved in making a determination concerning a covered application from a small business for purposes of § 1002.108.

Section 1002.108(c), which the Bureau is finalizing with updated cross-references to reflect other changes in the rule, explains the exception to the general prohibition set forth in final § 1002.108(b). Final § 1002.108(c) establishes an exception to the prohibition in final § 1002.108(b) and states that the prohibition does not apply to an employee or officer if the financial institution determines that it is not feasible to limit that employee's or officer's access to an applicant's responses to the financial institution's inquiries under final § 1002.107(a)(18) or (19) and the financial institution provides the notice required under final § 1002.108(d) to the applicant. It further provides that it is not feasible to limit access as required pursuant to final § 1002.108(b) if the financial institution determines that an employee or officer involved in making any determination concerning a covered application from a small business should have access to one or more applicants' responses to the financial institution's inquiries under final § 1002.107(a)(18) or (19).

However, in response to comments (including comments requesting clarification about how a financial institution should be permitted to determine feasibility pursuant to the final rule) and to provide additional clarity and guidance, the Bureau has divided proposed comment 108(c)–1 into two comments and revised and supplemented both comments. Specifically, the Bureau has added language in final comment 108(c)–1 to clarify that a financial institution is not required to separately determine the feasibility of maintaining a firewall. A determination that an employee or officer should have access means that it is not feasible to maintain a firewall as to that particular employee or officer, and the exception applies to that employee or officer if the financial institution provides the notice required by final § 1002.108(d).

The comment also clarifies the nature of the exception (*i.e.,* that it applies on an individual employee or officer basis, not an institution-wide basis). The comment states that the fact that a financial institution has made a determination that an employee or officer should have access does not mean that the financial institution can permit other employees and officers who are involved in making determinations concerning a covered application to have access to the information collected pursuant to final § 1002.107(a)(18) and (19). A financial institution may only permit an employee or officer who is involved in making a determination concerning a covered application to have access to information collected pursuant to final § 1002.107(a)(18) and (19) if it has determined that employee or officer or a group of which the employee or officer is a member should have access to the information.

The Bureau is not adopting one commenter's suggestion that the Bureau permit a financial institution to determine that a firewall is not feasible for a single employee and then allow all employees and officers to have access to protected demographic information. As explained above, the final rule clarifies that a financial institution can permit an employee or officer who is involved in making a determination concerning a covered applications from a small business to access that small business's protected demographic information only if the financial institution has determined that employee or officer should have access (*i.e.,* either individually or as part of a group). This requirement is not intended to be a ''gotcha,'' as suggested by the commenter, but rather a reasonable means of allowing a financial institution to provide employees and officers to have access to protected demographic information when such access may be necessary to perform assigned job duties without allowing such information to be widely accessible to those employees and officers who make determinations concerning covered applications but do not need the information to perform their jobs. The sample data collection form at appendix E includes sample language for the firewall notice, but the Bureau is not requiring use of that specific language for the firewall notice.

Final comment 108(c)–2 addresses how a financial institution may apply the exception to a specific employee or officer or a group of similarly situated employees or officers. It clarifies that a financial institution may determine that several employees and officers, all of a group of similarly situated employees or officers, and multiple groups of similarly situated employees or officers should have access to information collected pursuant to § 1002.107(a)(18) and (19). It also provides examples.

Final § 1002.108(a)(2) defines the phrase "should have access," which is used in § 1002.108(c) and related commentary. This phrase means that an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform that employee's or officer's assigned job duties. However, in response to comments, the Bureau has revised comment 108(a)–2 and added a comment 108(a)–2.iii. The Bureau has also revised comment 108(a)–2 to align with other changes finalized in the rule (*i.e.,* the elimination of requirements to collect information via visual observation or surname and the inclusion of the LGBTQI+-business status in final § 1002.107(a)(18)). These comments clarify how a financial institution may determine who should have access.

Final comment 108(a)–2.i explains that a financial institution may determine that an employee or officer who is involved in making a determination concerning a covered application should have access to protected demographic information if that employee or officer is assigned one or more job duties that may require the employee or officer to collect, see, consider, refer to, or use such information. The employee or officer does not have to be required to collect, see, consider, refer to, or use such information or to actually collect, see, consider, refer to or use such information in order for the financial institution to determine that the employee or officer should have access. It is sufficient if the employee or officer might need to do so to perform the employee's or officer's assigned job duties.

Final comment 108(a)–2.ii explains that a financial institution may determine that all employees or officers with the same job description or assigned duties should have access for purposes of final § 1002.108. If a financial institution assigns one or more tasks that may require access to one or more applicants' protected demographic information to a particular job title, the financial institution may determine that all employees and officers who share that job title should have access for purposes of § 1002.108.

Although the final rule does not provide a safe harbor for a financial institution's determination to account for variations in determining feasibility (*i.e.,* determining which employees and officers should have access) as two commenters requested, new comment 108(a)–2.iii states that a financial institution is permitted to choose what lawful factors it will consider when determining whether an employee or officer should have access to protected demographic information. A financial institution's determination that an employee or officer should have access may take into account relevant operational factors and lawful business practices. For example, a financial institution may consider its size, the number of employees and officers within the relevant line of business or at a particular branch or office location, and/or the number of covered applications the financial institution has received or expects to receive. Additionally, a financial institution may consider its current or its reasonably anticipated staffing levels, operations, systems, processes, policies, and procedures. A financial institution is not required to hire additional staff, upgrade its systems, change its lending or operational processes, or revise its policies or procedures for the sole purpose of determining who should have access.

The Bureau believes this new comment makes clear that different financial institutions may make different determinations regarding which employees and officers should have access and that those different determinations are permissible. Additionally, in response to commenters' suggestions that determinations of feasibility should satisfy the final rule if they are made in conformity with written procedures, the Bureau notes that a financial institution may choose to make its determinations regarding who should have access to protected demographic information pursuant to written procedures, but is not required to do so in order to have a determination satisfy the final rule. Furthermore, in light of the flexibility provided in § 1002.108, and because the firewall requirement was explicitly set forth by Congress in section 1071, the Bureau does not believe that providing further discretion in determining feasibility or adopting a safe harbor, as suggested by some commenters, would be appropriate.

Final § 1002.108(d) explains the requirement to provide a notice in order to qualify for the exception. The Bureau is finalizing § 1002.108(d) and comments 108(d)–1 and –3 largely as proposed, and has revised comment 108(d)–2 regarding the content of the notice. Final § 1002.108(d) has been revised to include LGBTQI+-owned business status, and cross-references have been updated to reflect changes elsewhere in the final rule. Specifically, final § 1002.108(d) states that in order to satisfy the exception set forth in final § 1002.108(c), a financial institution shall provide a notice to each applicant whose responses to inquiries for protected demographic information will be accessed, informing the applicant that one or more employees or officers involved in making determinations concerning the covered application may have access to the applicant's responses to the financial institution's inquiries regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and regarding the ethnicity, race, and sex of the applicant's principal owners. The financial institution shall provide the notice required by final § 1002.108(d) when making the inquiries required under final § 1002.107(a)(18) and (19) and together with the notices required pursuant to § 1002.107(a)(18) and (19).

Final comment 108(d)–1, which includes minor revisions for clarity, explains that if a financial institution determines that one or more employees or officers should have access pursuant to § 1002.108(c), the financial institution must provide the required notice to, at a minimum, the applicant or applicants whose responses will be accessed by an employee or officer involved in making determinations concerning the applicant's or applicants' covered applications. Alternatively, a financial institution may also provide the required notice to applicants whose responses will not or might not be accessed. For example, a financial institution could provide the notice to all applicants for covered credit transactions or all applicants for a specific type of product.

Final comment 108(d)–3, which includes minor revisions to align with changes made elsewhere in the final rule, explains the timing for providing the notice. Generally, the financial institution must provide the notice required by § 1002.108(d) prior to asking the applicant if it is a minority-owned, women-owned, or LGBTQI+-owned business and prior to asking for a principal owner's ethnicity, race, or sex. Additionally, the notice must be provided with the non-discrimination notices required pursuant to § 1002.107(a)(18) and (19).

While many commenters said that the Bureau should eliminate the notice requirement or should exempt certain covered financial institutions from the notice requirement, the Bureau does not believe it is appropriate to eliminate this statutory requirement or to except certain financial institutions from providing the notice if they are relying on the exception to the firewall requirement. Congress explicitly required that a financial institution provide a notice to an applicant if the financial institution does not limit certain employees' and officers' access to protected demographic information. Congress also required that applicants be permitted to refuse to provide the requested demographic information. Thus, an applicant should be told that certain employees and officers may have access to the protected demographic information so that the applicant can make an informed decision of whether to exercise the applicant's statutory right to refuse. The Bureau does not believe it would be appropriate to allow some or all financial institutions to forego providing applicants with the information they may need to determine whether to exercise this statutory right. Although some commenters said that the notice may undercut section 1071's purposes because the notice may cause applicants to refuse to provide the requested demographic information, the Bureau believes that Congress was aware of this potential result when it provided applicants with the right to receive a notice and the right to refuse to provide the requested information.

Additionally, other commenters undercut or contradicted the reasoning put forth by commenters opposed to providing the notice. For example, while a group of commenters opposed providing the notice based on the belief that it would create competitive disadvantages or burdens only for smaller institutions, other commenters said that larger institutions would also likely provide the notice in lieu of establishing and maintaining a firewall.[786] Other commenters supported allowing financial institutions to provide a notice in lieu of establishing and maintaining a firewall, and one commenter said that the notice was an important aspect of the proposed rule.

Nonetheless, in order to address commenters' concerns about the specific content proposed for the notice, the Bureau has revised comment 108(d)–2. That comment reiterates that the notice must inform the applicant that one or more employees and officers involved in making determinations concerning the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and its principal owners' ethnicity, race, and sex. However, the comment no longer prescribes language to be used for the notice and, instead, directs financial institutions to the sample data collection form included in the final rule for sample language that a financial institution may opt to use when providing the notice.[787] Alternatively, a financial institution may opt to use different language as long as the notice provides an applicant with the statutorily required information (*i.e.,* that one or more employees and officers involved in making determinations regarding the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and its principal owners' ethnicity, race, and sex). Final comment 108(d)–2 also notes, for clarity, that if a financial institution establishes and maintains a firewall and chooses to use the sample data collection form, it may delete the sample language for the firewall notice from the form because employees and officers involved in making determinations concerning applicants' covered applications will not have access to the applicants' responses to inquiries for protected demographic information.

Section 1002.109 Reporting of Data to the Bureau

Final § 1002.109 addresses several aspects of financial institutions' obligations to report small business lending data to the Bureau. First, § 1002.109(a) requires data to be collected on a calendar year basis and reported to the Bureau by June 1 of the following year, and addresses several related issues. Second, § 1002.109(b) details the information that financial institutions must provide about themselves when reporting data to the Bureau. Finally, § 1002.109(c) addresses technical instructions for submitting data to the Bureau.

The Bureau is finalizing § 1002.109 to implement ECOA section 704B(f)(1) and pursuant to its authority under 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. The Bureau is also finalizing § 1002.109(b) pursuant to 704B(e)(2)(H), which requires financial institutions to compile and maintain as part of their data any additional data that the Bureau determines would aid in fulfilling the purposes of section 1071.

Details regarding each aspect of final § 1002.109, including a discussion of what the Bureau proposed and comments received, are provided in the section-by-section analyses that follow.

109(a) Reporting to the Bureau

109(a)(1) Annual Reporting

Proposed Rule

ECOA section 704B(f)(1) provides that ''[t]he data required to be compiled and maintained under [section 1071] by any financial institution shall be submitted annually to the Bureau.''

Proposed § 1002.109(a)(1)(i) would have required that by June 1 following the calendar year for which data are collected and maintained as required by proposed § 1002.107, a covered financial institution shall submit its small business lending application register in the format prescribed by the Bureau. This approach to reporting frequency and reporting period is consistent with the annual submission schedule specified in the statute. The Bureau sought comment on this aspect of the proposal, and how best to implement it in a manner that minimizes cost and burden to small financial institutions.

Proposed § 1002.109(a)(1)(ii) would have required that an authorized representative of the covered financial institution with knowledge of the data submitted certify to the accuracy and completeness of data submitted pursuant to proposed § 1002.109(a). A similar provision exists in Regulation C (§ 1003.5(a)(i)), and the Bureau believed it appropriate to adopt a similar requirement here as well. Based on the Bureau's experience with HMDA and Regulation C, the Bureau believed that

[786] Aside from being speculative, such a competitive effect, if it existed, would be a direct consequence of the statutory mandate regarding the firewall: if the financial institution determines that an employee or officer should have access to protected demographic information, the notice must be provided.

[787] Regarding the comment that the Bureau should develop and provide the notice in Spanish as well as English when it publishes the final rule and add other translations over time, the Bureau notes that it will be translating the sample data collection form in appendix E (including the sample language for the notice on the form) into several languages. See also the discussion regarding compliance and technical assistance at the end of part I above.

having a specific person responsible for certifying to the accuracy and completeness of data is likely to lead to financial institutions providing better quality data.

Proposed § 1002.109(a)(1)(iii) would have clarified that when the last day for submission of data prescribed under proposed § 1002.109(a)(1) falls on a date that is not a business day, a submission is considered timely if it is submitted no later than the next business day.

The Bureau sought comment on its proposed approach to the aspects of reporting addressed in proposed § 1002.109(a), including that the reporting frequency be annual, that the reporting period be the calendar year, and that the submission date be June 1 of the next calendar year. In particular, the Bureau sought comment with respect to proposed § 1002.109(a)(1)(i) on whether requiring the submission of small business lending application registers by June 1 might give rise to complications for any persons or entities relying on data from the registers for other purposes, such as Federal regulators scheduling examinations.

Comments Received

In response to proposed § 1002.109(a)(1)(i), the Bureau received comments from lenders, trade associations, community groups, and others. Commenters discussed the reporting deadline of June 1, the calendar year reporting period, and the annual reporting frequency. Several commenters supported the Bureau's reporting frequency and period, as well as the reporting deadline of June 1. One bank urged the Bureau to permit reporting as early as March 1 for institutions who wished to do so. A few community groups and a CDFI lender supported the reporting frequency and period, but only supported the proposed deadline of June 1 contingent upon the Bureau's timely publication of the data later on in the year.

Some commenters supported the reporting frequency and period but did not support the reporting deadline. Of this group of commenters, one trade association urged the Bureau against aligning the section 1071 reporting deadline with the HMDA reporting deadline of March 1, citing a strain on resources. A trade association and a bank supported annual reporting but requested a later deadline. Finally, two trade associations requested the Bureau to permit ongoing reporting alongside annual reporting. Both of these commenters suggested the Bureau create a portal or centralized system where banks could input data as it is received. Both commenters mentioned the burden that would come along with maintaining a database internally, as well as concerns about system maintenance, cost, and risk. One of those trade associations also described an alternative whereby the Bureau could provide a link where small business loan applicants could input their own data or opt out of sharing their data altogether.

One bank did not support any aspect of proposed § 1002.109(a)(1)(i). This bank argued that adding another reporting regime, in addition to HMDA and CRA, would add significant burden to their staff, both at the loan origination stage and at the reporting stage. It also argued that having a mid-year reporting deadline would tie up critical compliance resources and would require them to spend one quarter of the year on reporting requirements.

Two trade associations touched on quarterly reporting. The first commented that large banks (for CRA purposes) should be required to provide their data within 30 days of a request to do so. They argued that if the Bureau absolves lenders of the requirement to respond to individual requests, then data should be reported quarterly. The second commented that the frequency of reporting that financial and regulatory agencies expect to receive is quarterly (Call Reports). They also stated that non-regulated lenders, CDFIs and other similar providers should be required to report no less than semi-annually.

Many commenters did not support the June 1 reporting deadline and the calendar year reporting period in particular. A lender and a business advocacy group urged the Bureau to adopt a reporting deadline of July 1 instead of June 1 to provide more time between HMDA reporting and section 1071 reporting. The business advocacy group stated that for institutions who report HMDA data quarterly, 60 days after quarter end, a deadline of June 1 would leave no separation between reporting requirements. A cross-sector group of lenders, community groups, and small business advocates urged the Bureau to adopt a May 1 to April 30 reporting period with a reporting deadline in July, citing that staggering reporting periods would ease regulatory burden for lenders who also report HMDA data. A joint letter from community groups suggested a reporting period of July 1 to June 30, citing that covered lenders would benefit by having six months to prepare before data collection begins.

Several banks requested the reporting deadline be no earlier than June 30 so that there would be more time to perform data integrity reviews for those lenders that are HMDA and/or CRA reporters. Several commenters requested, as a general matter, that reporting-related changes be effective January 1 rather than midyear.

Finally, several lenders urged the Bureau to coordinate section 1071 reporting with CDFI Fund reporting. They argued that CDFIs are required to report for a three-year period through the CDFI Fund's Transaction Level Reporting data points that are well beyond the scope of section 1071. They also suggested that the Bureau standardize data formats to match those used in CDFI Fund reporting, and to coordinate across agencies in order to streamline data collection and reporting requirements. This, they argue, would minimize the burden on CDFIs.

The Bureau did not receive any comments in response to proposed § 1002.109(a)(1)(ii) and (iii).

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.109(a)(1)(i) and (ii) as proposed, and finalizing § 1002.109(a)(1)(iii) with a revision for clarity. Specifically, under final § 1002.109(a)(1)(i), on or before June 1 following the calendar year for which data are compiled and maintained as required by § 1002.107, a covered financial institution shall submit its small business lending application register in the format prescribed by the Bureau. While several commenters advocated for more frequent reporting, the Bureau believes that its approach is consistent with the annual submission schedule specified in the statute. The Bureau is not permitting financial institutions to submit their data on a real-time basis or ongoing basis, as this approach could result in financial institutions treating the Bureau as their official recordkeeper for their data.[788] Regarding the comments supporting a June 1 submission date, contingent on rapid publication of data soon after, the Bureau addresses such comments in the section-by-section analyses of § 1002.110(a) and (b), and the privacy section in part VIII. While some commenters requested that financial institutions have the ability to submit data as early as March 1, the Bureau intends to make it possible for financial institutions to report as early as possible before June 1 each year once the small

[788] With respect to comment that it should build an online platform to receive data from applicants on a real-time basis, the Bureau does not, at this time, intend to take this step, in line with its analysis of demographic data submission in the section-by-section analysis of § 1002.107(a)(19).

business lending data reporting platform is established.

While some commenters suggested alternate reporting periods, the Bureau believes there are advantages to having data collected and reported on a calendar year basis. Calendar year reporting may facilitate other aspects of the rule that depend on data that is typically recorded on a calendar year basis. For instance, other parts of the rule look to annual data, such as § 1002.105(b), which would use a financial institution's loan volumes over the prior two calendar years to determine whether it is a covered financial institution. Further, the Bureau understands that financial institutions would generally prefer to have such data collections occur on a calendar year basis because such an approach would be generally consistent with their operations. An annual reporting period other than the calendar year—such as July 1 to June 30—could result in additional challenges for financial institutions in complying with the rule, which could in turn increase the probability of errors in collecting and reporting data to the Bureau.[789]

Regarding submission date, several commenters requested alternate deadlines such as March 1 or July 1. However, the Bureau believes that a June 1 submission deadline gives the compliance staff of financial institutions, especially smaller institutions, adequate time and resources to dedicate to preparing a small business lending application register, after meeting other reporting obligations earlier in the year, such as under HMDA or CRA. This remains true even though the final rule excludes all HMDA-reportable loans and even though the Federal prudential regulators have proposed amendments to the CRA rules that would use small business and small farm data from this rule. Many institutions will still have March deadlines for their HMDA and CRA reporting obligations unrelated to small business lending, and the Bureau believes a later deadline for reporting data collected under this final rule remains appropriate. Financial institutions with quarterly HMDA filing deadlines generally handle a high volume of mortgage loan originations and are more likely to have sufficient resources to cope with a June 1 deadline for this rule (and, indeed, any filing deadline set by the Bureau would be within 60 days of a quarterly HMDA filing deadline).

Final § 1002.109(a)(1)(ii) specifies that an authorized representative of the covered financial institution with knowledge of the data shall certify to the accuracy and completeness of the data reported pursuant to § 1002.109(a)(1)(i). The Bureau has modified final § 1002.109(a)(1)(iii) for clarity; it now provides that when June 1 falls on a Saturday or Sunday, a submission shall be considered timely if it is submitted on the next succeeding Monday.

109(a)(2) Reporting by Subsidiaries

Proposed Rule

ECOA section 704B(f)(1) states that "any" financial institution obligated to report data to the Bureau must do so annually; the statute does not expressly address financial institutions that are themselves subsidiaries of other financial institutions.

Proposed § 1002.109(a)(2) would have stated that a covered financial institution that is a subsidiary of another covered financial institution shall complete a separate small business lending application register. The proposal would have provided that a subsidiary shall submit its small business lending application register, directly or through its parent, to the Bureau. Proposed comment 109(a)(2)–1 would have explained that a covered financial institution is considered a subsidiary of another covered financial institution for purposes of reporting data pursuant to proposed § 1002.109 if more than 50 percent of the ownership or control of the first covered financial institution is held by the second covered financial institution. This proposed provision would have mirrored one that exists for HMDA reporting under Regulation C in § 1003.5(a)(2). The Bureau believed that the proposed provision would facilitate compliance by permitting parent financial institutions to coordinate the reporting of all their subsidiaries' small business lending data together.

The Bureau sought comment on this aspect of its proposal. Additionally, the Bureau sought comment on proposed § 1002.109(a)(2) in light of proposed § 1002.105(b), which would have defined a covered financial institution as a financial institution that originated at least 25 covered credit transactions for small businesses in each of the two preceding calendar years. The Bureau sought comment on whether this provision may risk creating ambiguity with respect to compliance and whether additional safeguards may be required to dissuade financial institutions from creating subsidiaries for the sole purpose of avoiding the collection and reporting of 1071 data. The Bureau also sought comment on all other aspects of this proposal.

Comments Received

The Bureau received comments from a bank, a trade association, and a community group on the proposed provision regarding reporting by subsidiaries. The community group had no objections to the Bureau's proposal. The bank recommended that the Bureau define subsidiary in subpart B, stating that the term was used extensively in this proposed provision and to dissuade financial institutions from creating subsidiaries in order to avoid reporting data. The community group recommended that the Bureau create safeguards against the possibility that a lender will develop an ownership structure that will evade reporting requirements, specifically that originations be counted at the parent or holding company level for the purposes of determining institutional coverage under § 1002.105(b).

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.109(a)(2) and associated commentary as proposed. The Bureau believes that this provision will help facilitate compliance through consistency with an existing provision in a separate regulation (Regulation C) familiar to many financial institutions and by also permitting financial institutions to coordinate the reporting of all their subsidiaries' small business lending data. The final rule provides a definition of subsidiary in comment 109(a)(2)–1.

The Bureau does not believe it is necessary to add to the rule a requirement to count originations at the parent or holding company level for the purposes of determining whether a financial institution has met the institutional coverage threshold. Final § 1002.105(b) defines a covered financial institution as a financial institution that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years. The Bureau believes that the process and costs of establishing a new charter to avoid reporting data, along with other associated obligations in forming a new legal entity, will generally dissuade lenders from creating subsidiaries through whom to make small business loans specifically for the purpose of avoiding coverage under this final rule.

[789] Regarding concerns that a January 1 collection date would be too soon after the publication of the rule, the Bureau addresses all concerns about the amount of time lenders have to comply with this rule in the section-by-section analysis of § 1002.114(b).

109(a)(3) Reporting Obligations Where Multiple Financial Institutions Are Involved in a Covered Credit Transaction

Background

Section 1071's requirement to collect and report data for any ''application to a financial institution for credit'' could be read as applying to more than one financial institution when an intermediary provides an application to another institution that takes final action on the application. It might also apply in cases where one application is simultaneously sent to multiple financial institutions for review. This broad reading may serve a useful function, such as comprehensive reporting by all financial institutions involved in a small business lending transaction, but could also generate duplicative compliance costs for financial institutions and potentially detract from the quality of reported data, increasing the risk that certain applications are reported multiple times with potential inconsistencies.

During the SBREFA process, several small entity representatives voiced support for aligning reporting requirements for financial institutions that are not the lender of record with the approach taken for HMDA reporting in the Bureau's Regulation C. Other small entity representatives expressed concern in adopting the Bureau's approach in Regulation C, noting the differences between small business and residential mortgage loan products, and advocated for simpler approaches.

SBREFA feedback from other stakeholders included support for a HMDA-like approach when multiple lenders are involved in a transaction, praising the Bureau's consistent approach and interest in limiting duplicative information. However, several stakeholders advocated against the HMDA approach, generally by proffering other ideas rather than criticizing the rules or outcomes of the HMDA approach. Alternative suggestions varied, but included suggesting that data collection and reporting should be required only for the company most closely interacting with the loan applicant; if a financial institution receives a covered application, then the application should be subject to reporting, regardless of outcome; the financial institution that funded (or would have funded) the loan should be required to collect and report; and the financial institution that conducts the underwriting and determines whether the small business credit applicant qualifies for credit using its underwriting criteria should be required to report and collect.

Proposed Rule

Proposed § 1002.109(a)(3) would have provided that only one covered financial institution shall report each covered credit transaction as an origination, and that if more than one financial institution was involved in an origination, the financial institution that made the final credit decision approving the application shall report the loan as an origination, if the financial institution is a covered financial institution.

Proposed § 1002.109(a)(3) would have further provided that if there was no origination, then any covered financial institution that made a credit decision shall report the application. The Bureau explained that under certain lending models, financial institutions may not always be aware of whether another financial institution originated a credit transaction. The Bureau believed that information on whether there was an origination should generally be available, or that lending models can be adjusted to provide this information at low cost.

Proposed comment 109(a)(3)–1 would have provided general guidance on how to report originations and applications involving more than one institution. In short, if more than one financial institution was involved in the origination of a covered credit transaction, the financial institution that made the final credit decision approving the application would report the covered credit transaction as an origination. Proposed comment 109(a)(3)–2 would have offered examples illustrating how a financial institution should report a particular application or originated covered credit transaction. Proposed comment 109(a)(3)–3 would have explained that if a covered financial institution made a credit decision on a covered application through the actions of an agent, the financial institution reports the application, and provided an example. State law determines whether one party is the agent of another. While these proposed comments assumed that all of the parties are covered financial institutions, the same principles and examples would apply if any of the parties were not a covered financial institution.

The Bureau sought comment on this aspect of its proposal. In particular, the Bureau sought comment with respect to proposed § 1002.109(a)(3) on whether, particularly in the case of applications that a financial institution is treating as withdrawn or denied, the financial institution can ascertain if a covered credit transaction was originated by another financial institution without logistical difficulty or significant compliance cost.

Comments Received

The Bureau received comments on this aspect of the proposal from a range of stakeholders, including lenders, trade associations, and community groups.

Several commenters, including trade associations and a community group, expressed general support for the Bureau's proposed approach, stating that it would help avoid duplicative reporting, the originating lender is best positioned to obtain the necessary information from the borrower, and the approach will increase the accuracy of the reported data, especially in an increasingly complex lending market. In addition, two credit union trade associations said that the proposal takes the correct approach for loan participation arrangements. Another trade association said that, to ensure simplicity, the Bureau should make the rule identical to Regulation C.

Conversely, several other industry commenters asserted that the proposal may be too complex or not feasible. A bank requested that the Bureau consider different reporting rules in cases where coordination among financial institutions is not feasible. A trade association stated that financial institutions are not aware of credit extensions made by competitors and are prohibited from sharing nonpublic personally identifiable information, including the existence of an account, with other financial institutions. This commenter pointed out that in indirect financing, the loan might be offered to multiple parties, so several financial institutions might be in this position.

Similarly, a joint letter from several insurance premium finance trade associations stated that insurance premium lenders generally do not know whether an application was originated by another financial institution, and it would be difficult, if not impossible to find out. These commenters suggested a new exception where insurance premium finance lenders are permitted to report data regarding any signed premium finance agreement they receive and take action upon (without requiring them to determine whether another lender originated the rare premium finance loan that is not approved and funded).

A joint letter from community and business advocacy groups argued that the proposal does not address the complexity of modern online lending. These commenters stated that online lenders often "rent a charter" to evade the limitations of State lending laws, the terms of these partnerships are often unknown, but under the proposal only one party would report the data without it being clear which one. They further noted that the final credit decision might be made by a digital algorithm but then approved by the depository institution. In addition, two credit union trade associations expressed uncertainty regarding who is responsible for errors or noncompliance—that is, credit union service organizations or the member credit union.

A joint letter from two motor vehicle dealer trade associations requested clarification on the rule's application, stating their belief that for indirect auto lending, the responsible party would typically be the indirect lender that advances funds, not the motor vehicle dealer. They further asserted that the dealer typically is identified on the credit contract as the seller-creditor even though the indirect lender as assignee-creditor performs the underwriting, funding, and servicing functions and determines whether, and on what terms, it will agree to take assignment of the credit contract. They argued that when an origination occurs, the lender taking assignment of the credit contract should be the entity responsible for compliance with section 1071, and that when an origination does not occur, then reporting responsibility should rest with the lender that conducted underwriting and determined that they would not take assignment of the credit contract.

A financial services trade association characterized the transaction differently, explaining that indirect vehicle finance transactions involve two separate, but related transactions. The commenter stated that a customer purchases a car from a motor vehicle dealer and executes a retail installment sales contract that finances the purchase price and any other products the customer elects to purchase. The dealer is the original creditor and negotiates the financing terms with the customer. Separately, the dealer communicates with one or more other financial institutions to determine which one will purchase the completed contract and at what terms. As purchaser of the credit contract, the financial institution takes assignment of the contract and begins servicing the contract until it is paid in full.

In addition, two trade associations pointed to Board regulations implementing ECOA and argued that the dealer would be prohibited under the law from asking the business owner for protected demographic information.

Some commenters expressed uncertainty regarding the Bureau's use of the term "final credit decision" in the proposal. Two commenters asserted that it was unclear which lender makes the final credit decision in situations where two lenders are required to make a credit decision to approve an application. A number of certified development companies, their trade association, and other lenders provided the example of the SBA's 504 Development Company Loan Program, which requires loans to be financed by both a certified development company and a private lender, asking who reports in such cases.

Several farm credit institutions and a trade association requested that the Bureau clarify that its rule does not apply to credit decisions made after loan approval. The commenters explained that farm credit institutions are required to make an independent judgment on the creditworthiness of the borrower, even in secondary market transactions, so it would be helpful to make clear that those judgments are not subject to data collection and reporting obligations. In addition, a group of trade associations requested that the rule text should more closely match the text in proposed comment 109(a)(3)–1.ii, saying that otherwise it could be misinterpreted to mean that as long as one institution reports its decision, then others need not do so.

A law firm commented that the Bureau should clarify that third-party review, even if for the purposes of telling the creditor that the third party will only purchase the post-origination loan under certain conditions, does not mean that the third party/potential purchaser made the final credit decision. The commenter explained that in these types of "forward flow" transactions, the third party does not originate the credit nor does it have any particular interest in whether the creditor approves and originates the transaction.

A group of trade associations stated that in the case of withdrawn applications, it would be impractical and burdensome for a financial institution to determine whether an applicant received credit elsewhere.

Commenters offered some alternative suggestions. Two industry commenters stated that if a loan is originated, only the creditor to whom the obligation is initially payable should be required to collect and report data. When there is no origination, only the institution that initially received the application should be required to collect and report data. These commenters asserted that this was a simpler approach, and the originating creditor is in the best position to collect and report all of the required data points.

A joint letter from community and business advocacy groups stated that the Bureau should assign reporting responsibility to the financial institution that has the predominant economic interest in and bears the predominant risk of a loan (or that would have had such an interest had the loan been consummated). These groups further asserted that it is important in online lenders' "rent a charter" arrangements for the Bureau to collect data on both the identity of the online lender and the depository institution because they are both ECOA creditors, but at a minimum the Bureau should collect data on the party that bears the bulk of the risk.

Another commenter stated that the Bureau should consider adding a non-unique (*i.e.,* shared across institutions) loan identifier that would allow matching of loans reported by multiple institutions (*e.g.,* a new data point). The commenter asserted that this would allow data users to match loans reported by multiple financial institutions and obviate the need to have such reporting rules.

Comments addressing partial interests and participation loans are discussed in the section-by-section analysis of § 1002.104(b). Moreover, several farm credit institutions urged the Bureau to clarify that in the syndicated loan context, the administrative agent is the sole lender with responsibility under the rule. Commenters explained that syndicated loans differ from participations in that multiple lenders enter into a contractual relationship with the borrower, but there is typically an administrative agent, which is primarily responsible for interacting with the applicant or borrower. A farm credit institution noted that the proposal's ambiguity with respect to syndicated loan reporting would create inaccuracies in reported information.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.109(a)(3) with modifications. Final § 1002.109(a)(3) states the general rule that each covered financial institution shall report the action that it takes on a covered application. Where it is necessary for more than one financial institution to make a credit decision in order to approve the covered credit transaction, however, only the last covered financial institution with authority to set the material terms of the covered credit transaction shall report the application. In addition, financial institutions report the actions of their agents.

Final comment 109(a)(3)–1 provides general guidance on how to report applications involving more than one institution. Final comment 109(a)(3)–2 provides a variety of examples to illustrate which financial institution reports a particular application when multiple financial institutions are involved in a covered credit transaction and how such applications are reported.

The Bureau has revised language in proposed § 1002.109(a)(3) that discussed outcomes ''if more than one financial institution was involved in an origination'' both for clarity, and to avoid complexity, logistical challenges, and potential data accuracy issues. Initially, final § 1002.109(a)(3) provides that each covered financial institution shall report the action that it takes on a covered application. Final comment 109(a)(3)–1.ii sets forth the various actions that a financial institution may take on a covered application. Certain of the examples in final comment § 1002.109(a)(3)–2 illustrate credit transactions that involve a single financial institution with responsibility for making a credit decision on a covered application. Those examples make clear that where a financial institution is only passively involved in a covered credit transaction or is only involved after the time of origination (for example, to purchase the loan), it has not taken action on the covered application and so does not report. For example, the Bureau understands that a non-originating financial institution may be ''involved'' with a covered credit transaction *after* closing (for example, if it purchases the covered credit transaction); however, such post-closing transactions (with the exception of applications for line increases) are generally not covered by the final rule. The Bureau further notes that whether an entity meets the definition of ''creditor'' under ECOA and Regulation B is not determinative of who reports under this rule.

Despite the general rule that all financial institutions shall report action taken on a covered application, final § 1002.9(a)(3) and final comment 109(a)(3)–1.i provide that where it is *necessary* for more than one financial institution to make a credit decision in order to approve the covered credit transaction, only the last financial institution with authority to set the material terms of the covered credit transaction is required to report. Setting the material terms of the covered credit transaction includes, for example, selecting among competing offers or modifying pricing information, amount approved or originated, or repayment duration. The fact that it is necessary for more than one financial institution to make a credit decision in order to approve the covered credit transaction does not mean that there was an actual approval or origination of the covered application. Rather, and in contrast to the passive conduit scenario described above, this provision applies when a financial institution would not originate a covered credit transaction unless it was approved by at least one other financial institution prior to closing.

The changes to § 1002.109(a)(3) are intended to address commenters' concerns that the NPRM approach was too complex or infeasible. Many of these commenters stated that it would be difficult for a financial institution to know if a loan was originated by another financial institution. Unlike the NPRM approach, final § 1002.109(a)(3) is not limited to requiring only one financial institution to report an *origination.* Final § 1002.109(a)(3) states that where it is necessary for more than one financial institution to make a credit decision to approve the covered credit transaction, only the last covered financial institution with authority to set the material terms of the covered credit transaction is required to report the application (*i.e.,* whether or not it was originated). In making this change, the Bureau seeks to avoid duplicative reporting in more than just cases of originated transactions; it seeks to clarify that only one financial institution is required to report on the application, no matter the action taken.

While the Bureau recognizes there may be some benefit in having multiple financial institutions reporting the same application, there are logistical challenges and potential data accuracy issues that could result from reporting by multiple financial institutions. For example, the Bureau understands that in some typical indirect lending situations, one application may be transmitted to several financial institutions to determine interest in purchasing an originated transaction, and requiring reporting from each of these financial institutions (even if the small business applicant is not aware of their involvement or the action taken by these institutions) would significantly increase reporting volumes for these types of transactions. Moreover, in this example, while this approach means a lack of visibility into purchase offers and an inability to compare them to the resulting credit contract, the Bureau believes that reporting of such data could undermine data quality and would provide only limited additional benefits where the purchase decisions are later accepted, declined, or altered by a different financial institution that ultimately presents (or does not present) a credit offer to the applicant. Thus, the Bureau believes data quality, along with the purposes of section 1071, will be better served if the financial institution with the last authority for setting the material terms of the covered transaction is the reporter.[790]

Final comment 109(a)(3)–1.i emphasizes that the determinative factor is not which financial institution actually made the last-in-time credit decision, but rather which financial institution had last authority for setting the material terms of the covered credit transaction, even if it did not actually exercise this authority in a particular case. For example, a financial institution that has the authority to modify the total loan amount prior to origination has the last authority for setting the terms of the covered credit transaction, even if it makes no changes to the total loan amount. The Bureau is adopting a categorical, rather than a case-by-case rule, to enable financial institutions to identify a reporting party at the outset of a transaction. The Bureau believes that this will help eliminate uncertainty and logistical challenges concerning which institution reports, and thus provide a more straightforward and administrable bright line.

This approach will also address requests for clarification from commenters. For example, one commenter suggested that the Bureau clarify that third-party review, even if for the purposes of telling the creditor that the third party will only purchase the post-origination loan under certain conditions, does not mean that third party/potential purchaser made the final credit decision. The Bureau believes that final comment 109(a)(3)–2.vii addresses this scenario, illustrating that where another financial institution has ultimate authority for setting the material terms of the covered credit transaction, the third party/potential purchaser does not report. In finalizing this approach, the Bureau is also removing the phrase ''final credit decision'' from § 1002.109(a)(3) because the phrase appears to have caused confusion and is not necessary to convey the Bureau's intentions regarding which financial institution is

[790] If the financial institution with last authority for setting the material terms of the covered credit transaction is not a covered financial institution, whether due to a statutory exemption (such as the one for motor vehicle dealers in section 1029) or other reasons, then the application is not reported under this rule.